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423-090—71——1

RELEVANT DOCKET ENTRIES

Date	
1969	
June 29	Petition for review of an order of the Securities and Exchange Commission
July 10	Transcript of record
July 10	Motion of respondent to dismiss petition for review
July 22	Petitioner's memorandum in opposition to respondent's motion to dismiss
August 4	Respondent's reply to petitioner's memorandum in opposition to respondent's motion to dismiss
August 15	Petitioner's motion for leave to file supplemental memorandum in opposition to respondent's motion to dismiss
August 25	Respondent's response to motion for leave to file supplementary memorandum in opposition to motion to dismiss
August 27	Clerk's order granting petitioner's motion for leave to file supplemental memorandum in opposition to respondent's motion to dismiss
August 27	Petitioner's supplementary memorandum in opposition to motion to dismiss
August 27	Reply of Securities & Exchange Commission to supplementary memorandum in opposition to motion to dismiss (Filed per Fiat of Judge Wright)
October 13	Per Curiam order denying respondent's motion to dismiss the petition for review without prejudice to renewal thereof in the briefs and at the argument on the merits McGowan, Tamm and Leventhal, CJ. Circuit Judge Tamm would grant respondent's motion to dismiss
November 12	Petitioner's brief
December 26	Respondent's brief
1970	
January 15	Petitioner's reply brief
January 26	Respondent's motion for leave to file a supplementary memorandum in response to the reply brief filed by petitioner
February 2	Petitioner's memorandum in response to motion for leave to file a supplementary memorandum
February 2	Petitioner's motion for leave to file attached response to supplementary memorandum of SEC
March 6	Order per Judge Robinson directing the Clerk to file respondent's lodged supplemental memorandum in response to petitioner's reply brief and petitioner's reply thereto; and denying petitioner's motion that the case be submitted for decision on the briefs without argument

Date 1970	
March 6	Respondent's supplemental memorandum in response to reply brief
March 6	Petitioner's reply to supplemental memorandum in response to reply brief
July 8	Opinion per Circuit Judge Tamm
July 8	Judgment remanding case to the Securities and Exchange Commission for further proceedings consistent with opinion
July 8	Order, sua sponte, amending opinion. Tamm, CJ
July 21	Respondent's motion to extend time to file a petition for rehearing and a suggestion for rehearing en banc to August 10
July 29	Order per Wright, ACJ extending time to file petition for rehearing and/or suggestion for rehearing *en banc* to August 10th
August 10	Respondent's petition for rehearing and suggestion for rehearing en banc
August 26	Per Curiam order denying respondent's petition for rehearing. McGowan, Tamm, Robinson, C.J.
March 29	Certified copy of Order of Supreme Court granting Certiorari on March 22, 1971

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1968

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

NOTIFICATION OF THE FILING OF A PETITION FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION

GENERAL COUNSEL
Securities and Exchange Commission
Washington, D.C.

GENTLEMEN: You are hereby notified that the attached is a true copy of the Petition for Review of an Order of the Securities and Exchange Commission filed in the said United States Court of Appeals for the District of Columbia Circuit, at Washington, D.C., on May 29, 1969, in the above-entitled case.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the District of Columbia Circuit, at Washington, D.C., this 2nd day of June, 1969.

NATHAN J. PAULSON,
Clerk of the United States Court of Appeals
for the District of Columbia Circuit.
By: MARIA L. HARRISON,
Deputy Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER,

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION

To the Honorable the Judges of the United States Court of Appeals for the District of Columbia Circuit:

Petitioner, The Medical Committee for Human Rights, a shareholder of record of Dow Chemical Company, a Delaware corporation, hereby petitions this Court for review of an Order of the Securities & Exchange Commission, issued on April 2, 1969, (S.E.C. File No. 1–3433) in which the Commission held that Dow's management had the right, as a matter of law, to omit from management's proxy solicitation materials two proposals submitted by petitioner for Dow's 1969 annual meeting.

ROBERTS B. OWEN,
888 Sixteenth Street, N.W.,
Washington, D.C. 20006,
Attorney for the Medical Committee for Human Rights.

May 29, 1969.

CERTIFICATE OF SERVICE PURSUANT TO RULE 25(d), FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify that I have mailed on this 29th day of May, 1969, by first-class mail postage prepaid, to Mr. W. A. Groening, Jr., General Counsel, The Dow Chemical Company, 2030 Abbott Road Center, Midland, Michigan 48640, a copy of a Petition for Review of an order of the Securities and Exchange

Commission issued April 2, 1969, (SEC File No. 1-3433), filed today in the U.S. Court of Appeals for the District of Columbia Circuit by the Medical Committee for Human Rights.

ROBERTS B. OWEN,
Attorney for Medical Committee for Human Rights.

United States Court of Appeals for the District of Columbia Circuit

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No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

CERTIFICATE OF TRANSCRIPT OF RECORD*

The Securities and Exchange Commission certifies the following documents, numbered 1 through 25, inclusive, a copy of each of which is attached, as a transcript of the record* in this case—being a copy of each of the letters between representatives of the Medical Committee for Human Rights, The Dow Chemical Company and the Commission that are contained in the Commission's files that pertain to the matters alluded to in the petition for review:

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*The Commission, concurrently with the filing of this certificate, has moved this Court to dismiss the petition for review for lack of jurisdiction and has filed a memorandum in support of that motion to which the documents enumerated herein are appended. For the reasons stated in that memorandum, the Commission does not believe that there exists for certification a transcript of any "record" upon which an "order" or other reviewable action has been entered within the meaning of any relevant statute or of Rules 16 and 17 of the Federal Rules of Appellate Procedure. Without prejudice to the Commission's position, as noted in the memorandum, this certificate is filed in accordance with the procedural precedent established in the case of *Leighton* v. *Securities and Exchange Commission*, 95 App. D.C. 217, 221 F. 2d 91, *certiorari denied*, 350 U.S. 825 (1955).

Document No.	Description	Pages
1.	Letter, dated March 11, 1968, from Quentin D. Young, M.D., National Chairman, Medical Committee for Human Rights, to Secretary, Dow Chemical Company	1a–3a
2.	Letter, dated March 21, 1968, from W. A. Groening, Jr., General Counsel, The Dow Chemical Company, to Dr. Young	4a
3.	Letter, dated March 26, 1968, from Dr. Young to Mr. Groening	5a–6a
4.	Letter, dated January 6, 1969, from Dr. Young to Mr. Groening	7a–8a
5.	Letter, dated January 17, 1969, from Mr. Groening to Herbert H. Dow, Secretary, The Dow Chemical Company	9a–10a
6.	Letter, dated January 17, 1969, from Mr. Dow to Dr. Young	11a
7.	Letter, dated January 17, 1969, from Mr. Dow to Securities and Exchange Commission	12a
8.	Letter, dated January 24, 1969, from Mr. Groening to M. E. Jaffe, Securities and Exchange Commission	13a
9.	Letter, dated February 3, 1969, from Dr. Young to Mr. Groening	14a
10.	Letter, dated February 3, 1969, from Dr. Young to Mr. Groening	15a–16a
11.	Letter, dated February 3, 1969, from Dr. Young to the Commission, attention Donald Lewis	17a
12.	Letter, dated February 7, 1969, from Mr. Dow to the Commission	18a
13.	Letter, dated February 7, 1969, from Mr. Groening to Mr. Dow	19a
14.	Letter, dated February 18, 1969, from Courtney Whitney, Chief Counsel, Division of Corporation Finance to Mr. Dow	20a
15.	Letter, dated February 18, 1969, from Mr. Whitney to Dr. Young	21a
16.	Letter, dated February 28, 1969, from Mr. Groening to the Commission	22a–23a
17.	Letter, dated February 28, 1969, from Messrs. Arnold & Porter, to the Commission, attention Mr. Whitney	24a
18.	Letter, dated February 28, 1969, from Messrs. Arnold & Porter, to the Commission, attention Mr. Lewis	25a
19.	Letter, dated February 28, 1969, from Messrs. Arnold & Porter to the Commission	26a–33a
20.	Letter, dated March 7, 1969, from R. W. Barker, Assistant General Counsel, The Dow Chemical Company, to the Commission, attention Mr. Jaffe	34a–35a
21.	Letter, dated March 14, 1969, from William E. Toomey, Assistant Chief Counsel, Division of Corporation Finance, to Jeffrey Bauman, Esq., Messrs. Arnold & Porter	36a
22.	Letter, dated March 17, 1969, from Messrs. Arnold & Porter to the Commission, attention Mr. Whitney	37a
23.	Letter, dated March 17, 1969, from Messrs. Arnold & Porter to the Commission	38a–43a
24.	Letter, dated April 2, 1969, from Mr. Whitney to Mr. Bauman	44a
25.	Letter, dated April 2, 1969, from Mr. Whitney to Mr. Groening	45a

The Commission also certifies that document number 26, a copy of which is attached, page 46a, is a true copy of a minute of Commission action as it appears in the official Minute Record of Commission Actions, and that document number 26 as shown in that Minute Record reflects the only action taken by the Commission prior to the filing of the petition for review herein with respect to the matters alluded to in the petition.

For the Commission (pursuant to delegated authority):

ORVAL L. DUBOIS,
Secretary.

Washington, D.C.
July 10, 1969

[1a]

MEDICAL COMMITTEE FOR HUMAN RIGHTS

MARCH 11, 1968.

SECRETARY, DOW CHEMICAL COMPANY,
General Office Building,
2030 Abbott Road Center,
Midland, Michigan 48640

DEAR SIR: The Medical Committee for Human Rights, through a generous gift, has become owner of shares in Dow Chemical Company. While we are pleased to be beneficiaries of such support, it has been called to our attention that at least one of the products manufactured by our company raises moral and ethical questions pertinent to the goals of the Medical Committee for Human Rights.

I refer, of course, to the production of napalm. After consultation with the executive body of the Medical Committee, I have been instructed to request an amendment to the charter of our company, Dow Chemical. We have learned that we are technically late in asking for an amendment at this date, but we wish to observe that it is a matter of such great urgency that we think it is imperative not to delay until the shareholders' meeting next year. We respectfully request that this proposal be included in the proxy statement which will be sent to the shareholders informing them of the matters to be considered at the meeting of May 8, 1968.

We hope you will be able to comply with this request, though late, because delay could result in the horrible death and suffering of thousands of civilians inflicted by our product, par-

ticularly in Vietnam, but not only there. Should you be unable to consider this request for technical reasons, we might have to turn to other shareholders to obtain a special shareholders' meeting to consider the proposal. This unnecessary expense could be avoided if our proposed amendment is simply [2a] included at this time for this year's annual meeting.

We respectfully propose the following wording to be sent to the shareholders:

> "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

Further, while we do not wish to propose the precise wording that the proposed amendment by the Board of Directors should take, for the benefit of the Board, we suggest it might be helpful to have the following proposed amendment to the Composite Certificate of Incorporation for their assistance and guidance:

> "RESOLVED, that Article III of the Composite Certificate of Incorporation of the Dow Chemical Company be and is hereby amended to include Clause (K) which provides as follows: '(K) But none of the following clauses shall be taken to authorize the sale of napalm to any buyer unless the buyer gives reasonable assurance that the substance will not be used on or against human beings.' "

Finally, we wish to note that our objections to the sale of this product is primarily based on the concerns for human life inherent in our organization's credo. However, we are further informed by our investment advisers that this product is also bad for our company's business as it is being used in the Vietnamese War. It is now clear from company statements and press reports that it is increasingly hard to recruit the highly intelligent, well-motivated, young college men so important for company growth. There is, as well, an adverse impact on our

global business, which our advisers indicate, suffers as a result of the public reaction to this product.

[3a] I trust that the amendments will be handled expeditiously. In any event, we request the amendments be prepared for 1969 consideration if the Board feels it cannot handle the issue in 1968.

Sincerely yours,

QUENTIN D. YOUNG, M.D.,
National Chairman,
Medical Committee for
Human Rights.

CC: President, Dow Chemical Company
General Counsel, Dow Chemical Company
Chairman, Securities and Exchange Commission

[4a]

THE DOW CHEMICAL COMPANY
General Office Building,
2030 Abbott Road Center,
Midland, Michigan 48640,
March 21, 1968.

QUENTIN D. YOUNG, M.D.,
National Chairman, Medical Committee for Human Rights,
1512 East 55th Street, Chicago, Illinois 60615.

DEAR DR. YOUNG: This will reply to your letter of March 11 in which you propose an amendment to our Certificate of Incorporation to insert limitations on the sale of napalm.

Your letter has arrived too late for the proposal to be considered in connection with the annual meeting of May 8, 1968, as the proxy statement has already been printed and it must be mailed forthwith to security holders so that they may have ample notice of the meeting in time to return their proxies.

With regard to your request that the proposal be considered for the 1969 annual meeting, we will study the matter and will communicate with you later this year.

Sincerely yours,

W. A. GROENING, Jr., *General Counsel.*

cc: H. D. Doan, President
H. H. Dow, Secretary
Securities and Exchange Commission
Att'n: Mr. Donald Lewis, Branch Chief

[5a]

MARCH 26, 1968.

Mr. W. A. GROENING, Jr.,
General Counsel, The Dow Chemical Company, 2030 Abbott Road Center, Midland, Michigan 48640.

DEAR MR. GROENING: I have received your reply to my letter of March 11th. I am, of course, very disappointed that my proposed amendment was not prepared for the proxy statement which will be mailed forthwith to securities holders. As I stated on March 11th, the matter in question is of extraordinary importance. A year's delay in changing our charter will almost certainly result in our product burning thousands of civilians, many of them to death. But, as I also emphasized in my communication, it is obvious that the company is suffering in two practical ways additionally: We are not attracting the top college graduates because of their shared concern over the use of our product; and, sales at home and abroad are doubtless adversely affected by the bad reputation the use of our product has engendered.

Therefore, I believe I can urge that you promptly mail the brief proposed amendment to all security holders. Assembling a special meeting for this purpose would be costly.

[6a] Please send me a list of security holders in our company.

Sincerely,

QUENTIN D. YOUNG, M.D.,
National Chairman,
Medical Committee for Human Rights.

cc: H. D. Doan, President
H. H. Dow, Secretary
Securities and Exchange Commission
Att'n: Mr. Donald Lewis, Branch Chief

[7a]

MEDICAL COMMITTEE FOR HUMAN RIGHTS,
1512 East 55th Street,
Chicago, Illinois 60615,
January 6, 1969.

Mr. W. A. GROENING, Jr.,
General Counsel, Dow Chemical Company, 2030 Abbott Road Center, Midland, Michigan 48640.

DEAR MR. GROENING: On March 21, 1968 you informed me that a proposed amendment to our Certificate of Incorporation

to insert limitations on the sale of napalm in connection with the annual meeting on May 8, 1968, was submitted too late to be included in the proxy statement, which was being mailed forthwith to security holders. You closed your letter: "With regard to your request that the proposal be considered for the 1969 annual meeting, we will study the matter and will communicate with you later this year." I am, of course, distressed that 1968 has passed without our having received a single word from you on this important matter.

Be that as it may, I would at this time once again respectfully request that our proposal be included in the proxy statement which will be sent to shareholders informing them of matters to be considered at the 1969 meeting. In addition to the cogent reasons enumerated last year, we find even more compelling feature of peace negotiations, which may well make termination of the use of our products against humans a reality, at least in Vietnam. This fact constitutes an opportunity which can go far toward restoring the image of our Company.

By submitting this amendment sufficiently in advance of the mailing to shareholders, we trust there can now be no obstacle to permitting the shareholders to express themselves.

For your convenience, I am stating once again the proposal you were unable to send out last year:

[8a] "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

Further, while we do not wish to propose the precise working that the proposed amendment by the Board of Directors should take, for the benefit of the Board, we suggest it might be helpful to have the following proposed amendment to the Composite Certificate of Incorporation for their assistance and guidance:

"RESOLVED, that Article III of the Composite Certificate of Incorporation of the Dow Chemical Com-

pany be and is hereby amended to include Clause (K) which provides as follows: '(K) but none of the following clauses shall be taken to authorize the sale of napalm to any buyer unless the buyer gives reasonable assurance that the substance will not be used on or against human beings.'"

Sincerely yours,

QUENTIN D. YOUNG, M.D.,
Member, Executive Committee,
Medical Committee for Human Rights.

CC: Mr. H. D. Doan, President, Dow Chemical Company
Mr. H. H. Dow, Secretary, Dow Chemical Company
Securities and Exchange Commission, Attention: Mr. Donald Lewis, Branch Chief
T. G. G. Wilson, M.D., Ph. D., National Chairman, Medical Committee for Human Rights

[9a]

WILLIAM A. GROENING, Jr.
Attorney and Counsellor at Law,
Midland, Michigan,
January 17, 1969.

Mr. HERBERT H. DOW,
Secretary,
The Dow Chemical Company,
Midland, Michigan 48640.

DEAR MR. DOW: You have received from Dr. Quentin D. Young, Member of the Executive Committee of the Medical Committee for Human Rights, a copy of his letter to me dated January 6, 1969, setting forth a proposal that Article III of the Composite Certificate of Incorporation of The Dow Chemical Company be amended by the addition of a clause (k) to read as follows:

> "but none of the following clauses shall be taken to authorize the sale of napalm to any buyer unless the buyer gives reasonable assurance that the substance will not be used on or against human beings."

I have reviewed the proposal of the Medical Committee for Human Rights in the light of Regulation 14A of the Securities and Exchange Commission and especially Rule 14a–8(c) which sets forth five circumstances under which the management

may omit a proposal and any statement in support thereof from its proxy statement and form of proxy.

Rule 14a–8(c)(5) permits such omission.

> "If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."

It is my opinion that the determination of the products which the Company shall manufacture, the customers to which it shall sell the products, and the conditions under which it shall make such sales are related to the conduct of the ordinary business operations of the Company and that any attempt to amend the Certificate of Incorporation to define the circumstances under which the management of the Comapny shall make such determinations is contrary to the concept of corporate management, which is inherent in the Delaware General Corporation Act under which the Company is organized. Moreover, [10a] there is a considerable doubt as to the efficacy of the proposed limitation in the context of the ability of the Government of the United States to issue a directive that the Company manufacure napalm. Therefore, the proposed limitation could conceivably be contrary to the requirements of the Defense Production Act of 1950.

Rule 14a–8(c)(2) provides for omission of a proposal

> "If it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."

It is a well-known fact that the Company has been the target of protests and demonstrations for the past few years at its office and plant locations, and on the occasion of recruiting on college and university campuses, as well as at its annual meeting of stockholders held May 8, 1968. The various protests and demonstrations are a reflection of opposition on the part of certain segments of the population against the policy of the United States Government in waging the war in Viet Nam. Although The Dow Chemical Company was not among the 100 largest prime contractors with the Department of Defense during the 1967–68 Government fiscal year and was only 75th on the list

in the 1966–67 fiscal year, it appears to have been singled out symbolically by the protesters. Under all of these circumstances it is my opinion that it clearly appears that the proposal is primarily for the purpose of promoting a general political, social or similar cause.

In conclusion, it is my opinion that under Rules 14a–8(c) (2) and (5) the Company may omit the proposal of the Medical Committee for Human Rights from its proxy statement for the annual meeting of stockholders to be held May 7, 1969.

Sincerely yours,

W. A. GROENING, Jr.

[11a]

THE DOW CHEMICAL COMPANY,
Midland, Michigan 48640,
January 17, 1969.

Dr. QUENTIN D. YOUNG,
Member, Executive Committee, Medical Committee for Human Rights, 1512 East 55th Street, Chicago, Illinois 60615.

DEAR DR. YOUNG: This will reply to your letter of January 6 addressed to Mr. W. A. Groening, Jr.

We intend to omit your proposal from our proxy statement and form of proxy for our annual meeting of stockholders to be held May 7, 1969. Enclosed is a copy of our letter to the Securities and Exchange Commission setting forth the statement of reasons why we deem the omission of the proposal to be proper. In support of same we also enclose a copy of Mr. Groening's opinion as General Counsel of the Company.

Sincerely yours,

HERBERT H. DOW, *Secretary.*

Enclosures
cc: H. D. Doan

[12a]

THE DOW CHEMICAL COMPANY,
Midland, Michigan 48640,
January 17, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Avenue,
Washington, D.C. 20549.

Re: *File No. 1–3433*

GENTLEMEN: I enclose herewith a proposal of the Medical Committee for Human Rights pertaining to a question to be

submitted at our 1969 annual meeting. Also enclosed is the opinion of Mr. W. A. Groening, Jr., General Counsel of our Company, concerning the status of the proposal under Rule 14a–8(c) of the Securities and Exchange Commission.

For the reasons set forth in Rule 14a–8(c) (2) and (5), The Dow Chemical Company intends to omit the proposal from its proxy statement and form of proxy for its annual meeting of stockholders to be held May 7, 1969.

A copy of this letter and of Mr. Groening's opinion is being forwarded to the Medical Committee for Human Rights.

Sincerely yours,

HERBERT H. DOW, *Secretary.*

Enclosures

cc: Medical Committee for Human Rights
1512 E. 55th St.
Chicago, Ill. 60615

[13a]

THE DOW CHEMICAL COMPANY,
General Office Building,
2030 Abbott Road Center,
Midland, Michigan 48640,
January 24, 1969.

Mr. M. E. JAFFE,
Securities and Exchange Commission,
500 North Capitol Avenue,
Washington, D.C. 20549.
Re: *File No. 1–3433*

DEAR MR. JAFFE: Pursuant to our telephone conversation of this morning I am enclosing a copy of the proposal of the Medical Committee for Human Rights which was inadvertently omitted from enclosure with our letter of January 17 to the Commission.

You will note that the proposer sent a copy of his letter to the attention of Mr. Donald Lewis.

Sincerely yours,

W. A. GROENING, Jr., *General Counsel.*

Enclosure

[11a]

MEDICAL COMMITTEE FOR HUMAN RIGHTS,
1512 East 55th Street,
Chicago, Illinois 60615,
February 3, 1969.

Mr. W. A. GROENING, JR.,
General Counsel,
Dow Chemical Company,
2030 Abbott Road Center,
Midland, Michigan 48640.

DEAR MR. GROENING: Enclosed is a new request by the Medical Committee for Human Rights for a proposal to be included by the management of our company's proxy statement, along with a copy of a letter which we have sent to the Securities and Exchange Commission.

Sincerely yours,

QUENTIN D. YOUNG, M.D.,
Member, Executive Committee,
Medical Committee for Human Rights.

[15a]

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

1512 East 55th Street,
Chicago, Illinois 60615,
February 3, 1969.

Mr. W. A. GROENING, JR.,
General Counsel,
Dow Chemical Company,
2030 Abbott Road Center,
Midland, Michigan 48640.

DEAR MR. GROENING: On behalf of the Medical Committee for Human Rights, I would like to thank you for your gracious consideration of the Committee's proposed resolution to be submitted to our company's shareholders.

We were disappointed to discover that in your legal memoranda for Mr. Dow you misconstrued the nature of our request. In order to make the purpose of our proposal very clear, and to meet certain of the objections to our proposal which were implied by your memo, we are submitting our proposal in a somewhat revised form with the expectation that the manage-

ment will agree to include our proposed resolution in the proxy statement to be sent to stockholders for the annual meeting to be held on May 7, 1969.

Your memo to Mr. Dow is devoted to a consideration of the "proposal that Article III of the Composite Certificate of Incorporation of the Dow Company be amended by the addition of a Clause 'K'," which you then quote. We have made no such proposal to Dow, nor would we presume to serve as draftsmen for an amendment to the corporate charter. As we said in our letter of March 11, 1968, and repeated in our letter of January 6, 1969, "we do not wish to propose the precise wording that the proposed amendment by the Board of Directors should take." For the Board's benefit we did offer some language which it could use or reject, as it saw fit, in considering our proposal. But I must inform you that we were somewhat disappointed that your memo to Mr. Dow dwelt on a proposal which we did not make and failed even to discuss the proposal which we said that we would like to have included in the proxy statement.

[16a] Quite simply, we proposed that the shareholders of Dow request the company's Directors to consider the advisability of adopting an amendment, to the purposes' section of the corporate charter. We are convinced that our company's sale of napalm has damaged the company financially, and that it is outside of the scope of business in which the company's owners would like Dow to be engaged. We are willing to bend, however, to your belief that the management should be allowed to decide to whom and under what conditions it will sell its products. Nevertheless, we are certain that you would agree that the company's owners have not only the legal power but also the historic and economic obligation to determine what products their company will manufacture. Therefore, with the hope that you will find our revised proposal suitable for submission to the stockholders, requesting the Directors to consider the advisability of adopting an amendment to the corporate charter forbidding the company to make napalm (any such amendment would, of course, be subject to the requirements of the "Defense Production Act of 1950," as are the corporate charters and management decisions of all United States Corporations), we request that the following resolution be included in this year's proxy statement:

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors,

in accordance with the laws of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm."

Sincerely yours,

QUENTIN D. YOUNG, M.D.,
Member, Executive Committee,
Medical Committee for Human Rights.

CC: Mr. H. D. Dow, President, Dow Chemical Company
Mr. H. H. Dow, Secretary, Dow Chemical Company
Securities and Exchange Commission, Attn: Mr. Donald Lewis
T.G.G. Wilson, M.D., Ph. D., National Chairman, Medical Committee for Human Rights

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[17a]

MEDICAL COMMITTEE FOR HUMAN RIGHTS,
1512 East 55th Street,
Chicago, Illinois 60615,
February 3, 1969.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

Attention: Mr. Donald Lewis

DEAR MR. LEWIS: Enclosed is a copy of a request for a resolution to be included by the Dow Chemical Company in its proxy statement for the annual meeting of stockholders to be held on May 7, 1969, pursuant to Rule 14A–8. We hope that the management will agree to include this proposal in its proxy statement.

Should Dow decide to omit the proposal, however, we request a staff review of Dow's decision. If the staff agrees with Dow's decision to omit the proposal, we request an oral argument before the Commission itself.

Sincerely yours,

QUENTIN D. YOUNG, M.D.,
Member, Executive Committee,
Medical Committee for Human Rights.

Encl.

[18a]

THE DOW CHEMICAL COMPANY
Midland, Michigan 48640,
February 7, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Avenue,
Washington, D.C. 20549.

Re: *File No. 1–3433*

GENTLEMEN: I enclose copies of three letters from the Medical Committee for Human Rights, two of them being addressed to our General Counsel, Mr. W. A. Groening, Jr. and the third being a copy of a letter addressed to Mr. Donald Lewis of the Securities and Exchange Commission. Also enclosed is the opinion of Mr. Groening commenting on the same.

For the reasons set forth in Rules 14a–8(a) and 14a–8(c) (2) and (5) we intend to omit the proposal from our proxy statement and form of proxy for our annual meeting of stockholders to be held May 7, 1969.

A copy of this letter and of Mr. Groening's opinion is being forwarded to the Medical Committee for Human Rights.

Sincerely yours,

HERBERT H. DOW, *Secretary.*

Enclosures
cc: Herbert D. Doan
Medical Committee for Human Rights,
1512 E. 55th St.,
Chicago, Ill. 60615.

[19a]

WILLIAM A. GROENING, Jr.,
Attorney and Counsellor at Law,
Midland, Michigan,
February 7, 1969.

Mr. HERBERT H. DOW,
Secretary,
The Dow Chemical Company,
Midland, Michigan 48640.

DEAR MR. DOW: You have received a copy of the letter from the Medical Committee for Human Rights signed by Dr. Quentin D. Young dated February 3, 1969, and addressed to

me in which he sets forth the following resolution to be included in the proxy statement for the Company's 1969 annual meeting:

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm."

Dr. Young's letter states that I have misconstrued the nature of the request set forth in his letter of January 6 and he offers new wording because of that. My opinion to you of January 17 was not concerned with the form or wording of the proposal but was concerned with the substance of the matter involved. The new proposal, if in fact it is a new proposal, is subject to the same substantive comments as were set forth in my letter of January 17 and I, therefore, reaffirm my opinion of that date that under Rules 14a–8(c) (2) and (5) the proposal, whether in the form set forth in Dr. Young's letter of January 6 or in the form set forth in his letter of February 3, is one that the Company may omit from its proxy statement for the forthcoming annual meeting of stockholders.

If, in fact, the proposal set forth in the letter of February 3 is a new proposal rather than a restatement of the first proposal, it is one which under Rule 14a–8(a) may be omitted because it has not been submitted at least 60 days in advance of a day corresponding to the first date on which our proxy soliciting material was released to security holders in connection with last year's annual meeting. That date last year was March 25, 1968.

Sincerely yours,

W. A. GROENING, Jr.

[20a]

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C. 20549, February 18, 1969.

Mr. HERBERT H. DOW,
Secretary, The Dow Chemical Company, Midland, Michigan 48640

Re: File No. 1–3433

DEAR MR. DOW: This is with respect to the proposal submitted by Dr. Quentin D. Young in a letter to your company dated

January 6, 1969, concerning an amendment to the Composite Certificate of Incorporation to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings for inclusion in the proxy material for the 1969 annual meeting of shareholders.

For reasons stated in your letter and the accompanying opinion of counsel, both dated January 17, 1969, this Division will not recommend any action to the Commission if this proposal is omitted from the management's proxy material for the Company's annual meeting pursuant to Rules 14a–8(c)(2) and 14a–8(c)(5) under the Securities Exchange Act of 1934.

Sincerely yours,

COURTNEY WHITNEY,
Chief Counsel, Division of Corporation Finance.

cc: Dr. Quentin D. Young,
Member, Executive Committee, Medical Committee for Human Rights, 1512 East 55th Street, Chicago, Illinois 60615

[21a]

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549, February 18, 1969.

File No. 1–3433

Dr. QUENTIN D. YOUNG,
Member, Executive Committee, Medical Committee for Human Rights, 1512 East 55th Street, Chicago, Illinois 60615

Re: The Dow Chemical Company

DEAR DR. YOUNG: This is with regard to the proposal concerning an amendment to the Composite Certificate of Incorporation of The Dow Chemical Company to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings which you submitted in your letter to Dow Chemical Company dated January 6, 1969. Enclosed is a copy of our letter to the Company, indicating that this Division will not recommend any action to the Commission if your proposal is omitted from the Company's proxy soliciting material.

Sincerely yours,

COURTNEY WHITNEY,
Chief Counsel, Division of Corporation Finance.

Enclosure:
Carbon copy of letter

[22a]

THE DOW CHEMICAL COMPANY,
General Office Building, 2030 Abbott Road Center,
Midland, Michigan 48640, February 28, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol, Washington, D.C. 20549
Re: *File No. 1–3433*

GENTLEMEN: Pursuant to Rule X–14A–6 under the Securities Exchange Act of 1934, we submit herewith five preliminary copies each of the proposed proxy statement and form of proxy, plus one copy of the proxy statement marked to show changes, pertaining to the annual meeting of stockholders of The Dow Chemical Company schedule for Wednesday, May 10, 1969.

Present plans are to commence mailing this material to the holders of Common Stock on March 20, 1969.

Your attention is directed to the fact that the number of shares to be outstanding at the close of business March 10, 1969, is unknown at the present time because of the possibilities of debenture conversions and exercise of employee options. This figure will, of course, be filled in prior to final printing. For your information, the number of shares outstanding and entitled to vote at the close of business January 31, 1969, was 30,234,537, excluding the 1,000,000 issued shares held by the Company as treasury stock.

Proxies were submitted with respect to the prior year's annual meeting in accordance with the Securities and Exchange Commission's proxy rules. Copies of all proxy solicitation material were filed with you over my signature under date of March 22, 1968.

The proposed proxy statement differs from last year's proxy statement in the following particulars:

1. There is one change in the Board of Directors. The retirement of Earl W. Bennett from the Board is discussed and G. J. Williams, recently appointed to the Board, is presented as a new nominee.

[23a] 2. Under the caption "Remuneration and Retirement Benefits, and Transactions with Officers and Directors", information concerning dividend units and options has been removed but has been included in the description of Proposal No. 3 under the caption "The Dow Chemical Company Award Plan".

3. Proposals No's. 1, 2 and 3 have been added to this year's proxy statement as have Exhibits A, B and C, all of which relate to the same. Because of the presentation of these proposals the form of proxy differs from last year, affording the stockholders the opportunity to vote separately upon each proposal and to vote separately for or against the election of directors.

4. Under the caption "Other Matters" reference is made to a proposal of a stockholder which the Company has omitted pursuant to its letter to the Commission dated January 17, 1969, to which the Chief Counsel of the Division of Corporation Finance responded under date of February 18, 1969.

If any representative of the Commission wishes to discuss any of the matters pertaining to the proxy statement and form of proxy, I shall be glad to accept a collect telephone call. My number is Area Code 517, 636–1957. If I should be absent, Mr. R. W. Barker, Assistant General Counsel, could take the call in my place.

Sincerely yours,

W. A. GROENING, Jr., *General Counsel.*

Enclosures

[24a]

ARNOLD & PORTER,
1229 Nineteenth Street, N.W., Washington, D.C. 20036,
February 28, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Street, N.W., Washington, D.C. 20549
(Attention: Courtney Whitney, Jr., Esq., Chief Counsel, Division of Corporation Finance)

GENTLEMEN: Enclosed is a letter concerning the resolution proposed by the Medical Committee for Human Rights for inclusion in the proxy statement of Dow Chemical Company in connection with the forthcoming annual meeting of stockholders to be held on May 7, 1969. We hereby renew our request that the decision of the Division of Corporation Finance to permit Dow to exclude this proposal be reviewed by the Commission, and we respectfully request that the enclosed letter be sent in its entirety to the Commission together with whatever other material the Division may deem appropriate.

If you have any questions on this matter, please contact the undersigned.

Sincerely,

ARNOLD & PORTER
By JEFFREY D. BAUMAN.

Enclosure

[25a]

ARNOLD & PORTER,
1229 Nineteenth Street, N.W.,
Washington, D.C. 20036, February 28, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Street, N.W., Washington, D.C. 20549
(Attention: Mr. Donald L. Lewis, Branch Chief, Division of Corporation Finance)

GENTLEMEN: Enclosed are 20 copies of a letter concerning the resolution proposed by the Medical Committee for Human Rights for inclusion in the proxy statement of Dow Chemical Company in connection with the forthcoming annual meeting of stockholders to be held on May 7, 1969. We hereby renew our request that the decision of the Division of Corporation Finance to permit Dow to exclude this proposal be reviewed by the Commission, and we respectfully request that the enclosed letter be sent in its entirety to the Commission together with whatever other material the Division may deem appropriate.

If you have any questions on this matter, please contact the undersigned.

Sincerely,

ARNOLD & PORTER
By JEFFREY D. BAUMAN.

Enclosures

[26a]

ARNOLD & PORTER,
1229 Nineteenth Street, N.W.,
Washington, D.C. 20036, February 28, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Street, N.W., Washington, D.C. 20549

GENTLEMEN: We are counsel for the Medical Committee for Human Rights ("Medical Committee") in connection with a proposed resolution to be included in the proxy statement of the Dow Chemical Company ("Dow") in connection with the annual meeting of stockholders to be held on May 7, 1969. On

February 18, 1969, the Division of Corporation Finance advised the Medical Committee that Dow could omit the proposal from its proxy soliciting material. We believe that this decision was erroneous, and that the proposal is a proper one for shareholder action under Rule 14a–8 of the Commission's Proxy Rules. Accordingly, we request that the Commission review the decision of the Division of Corporation Finance and take the necessary steps to compel Dow to include the proposal in its forthcoming proxy soliciting material.

I. The Resolution

The Medical Committee's proposal would require the inclusion of the following resolution:

> "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the state of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment **[27a]** to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

To meet some of Dow's objections to the above-quoted resolution, as set forth in Dow's letter of January 17, 1969 to the Medical Committee (see Section II, *infra*), the Medical Committee proposed an alternative resolution in a letter to Dow dated February 7, 1969. Dow has indicated that this latter resolution was not timely received. We believe that the arguments set forth in the body of this letter apply equally to the original resolution and to the alternative proposed by the Medical Committee, and we include the text of this alternative resolution below, should the Commission prefer to compel its inclusion rather than the inclusion of the original resolution.

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that the company shall not make napalm."

II. Background

On March 11, 1968, the Medical Committee, which owned five shares of the common stock of Dow, sent a letter to Dow requesting the inclusion of the first resolution quoted above in the proxy statement for the annual meeting of stockholders to be held on May 8, 1968. On March 21, 1968, Dow advised the Medical Committee that its letter had arrived too late for the proposal to be included in the proxy statement for that meeting, and it advised the Medical Committee that the request would be considered again in connection with the 1969 annual meeting. On January 6, 1969, having received no further communications [28a] from Dow on this matter, the Medical Committee renewed its request to Dow that the resolution be included in the proxy statement for the 1969 annual meeting. On January 17, 1969, counsel for Dow advised the Medical Committee that it would omit the proposed resolution from its proxy statement, seemingly in reliance on Rules 14a–8(c)(2) and (5) of the Commission's Proxy Rules. On February 3, 1969, the Medical Committee wrote to Dow, replying to its comments on the first resolution and proposing the second resolution as an alternative. On February 18, 1969, as we have pointed out, the Division of Corporation Finance advised Dow and the Medical Committee that the first resolution could be omitted.

III. Rule 14a–8(c)(5)

Rule 14a–8(c)(5) permits management to omit a shareholder proposal

> "if the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."

We contend that the Medical Committee's resolution cannot be excluded under the above-quoted paragraph. The resolution does not relate to the conduct of the ordinary business operations of the issuer. Rather, its subject matter is an amendment of the Certificate of Incorporation, a subject which, under Delaware law, can never be "a matter relating to the ordinary business operations of the issuer." Indeed, Delaware law specifically requires shareholder action before a corporation can

amend its Certificate of Incorporation. Section 242(d)(1) of the Delaware Corporation Law provides:

> "Every amendment * * * shall be made and effected in the following manner—
>
> [The corporation's] directors shall adopt a resolution setting forth the amendment **[29a]** proposed declaring its advisability, and either calling a special meeting of the stockholders * * * or directing that the amendment proposed be considered at the next annual meeting of the stockholders."

As the Commission is aware, on occasion, the Division of Corporation Finance has accepted the Medical Committee's argument on this point, albeit with respect to the amendment of bylaws rather than the Certification of Incorporation. As the Division stated in a letter of January 19, 1961,

> "We are not prepared to conclude that a matter which the courts have held to be a proper subject for a shareholder's proposal to amend the bylaws is a matter relating to the conduct of the ordinary business operations of the issuer within the meaning of 14a–8(c)(5)."

Dow itself impliedly concedes that Delaware law permits a shareholder to initiate a proposal to amend the Certificate of Incorporation, since it does not contend that the proposal could be omitted under Rule 14a–8(c)(1) as not being a proper subject for action by security holders under state law.

IV. Rule 14a–8(c)(2)

Rule 14a–8(c)(2) permits management to omit a shareholder proposal

> "if it clearly appears that the proposal is submitted by the security holder * * * primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."

[30a] In order to rely on this provision as a ground for excluding a shareholder proposal, management must demonstrate that the *primary* purpose of the proposal is to promote a "general * * * political cause"; it is not sufficient to demonstrate that *one* of the purposes of the resolution is political. It is our contention that the primary purpose of the Medical Com-

mittee's resolution is to assist Dow to improve the operations of its business. We believe that the adoption of the proposal will ultimately permit Dow to improve its admittedly troubled recruiting procedures, and to improve its public image. Dow itself recognizes that its ability to attract and retain "sensitive and creative employees" has been severely restricted by its continued manufacture of napalm, notwithstanding that napalm does not contribute materially to the income of Dow. See the article of February 10, 1969 from the New York Times attached to this letter.

It is clear from the history of Rule 14a–8(c)(2) that it was intended principally to prevent proxy statements from being used as a forum for referenda by stockholders on general political questions which bore no relationship to the business of the company. See Securities Exchange Act Release No. 3638, January 3, 1945. Indeed, the word "general" in the Rule must be read as modifying all the specific types of causes enumerated thereafter, *i.e.*, general political causes. The Rule was not intended to prevent shareholders from having a voice in the policy of a company in areas which are properly the concern of shareholders but which also happen to be of a political or social nature.

The Medical Committee admits that its proposal has a political aspect but it submits that the primary purpose of the proposal is not to promote a general political cause. We believe that to permit Dow to exclude the proposal would be contrary to the Commission's own Proxy Rules and to public policy. As former Chairman Cohen said in a recent speech,

[31a] "The corporation *as an institution* is, in fact, invested with *political* powers * * * our democratic ideals require that political power be limited; that countervailing power be maintained; that power be responsive to the community's needs and aspirations; and that legitimate power be non-authoritarian * * * The exercise of political power (whether by Government or business) cannot be legitimate unless it is non-authoritarian—that is, unless it is subject to free and systematic analysis and criticism—what I have termed institutional criticism." (Original emphasis)

We agree with these statements, and we suggest that the Commission's Proxy Rules afford a mechanism whereby this

institutional criticism can be exercised. As American corporations become increasingly political, it would be unfortunate indeed if stockholders were precluded from having a forum for expressing their views with respect to politically related corporate actions.

V. Conclusion

For the foregoing reasons, we submit that the resolution of the Medical Committee for Human Rights is a proper subject for shareholder action under the Commission's Proxy Rules and we request that the Commission take appropriate action to compel its inclusion in the proxy statement.
[32a] We would be pleased to present our views orally if the Commission believes such presentation would be helpful.

Sincerely,

Arnold & Porter

By

Jeffrey D. Bauman.

cc: Mr. H. D. Doan, President, Dow Chemical Company
Mr. H. H. Dow, Secretary, Dow Chemical Company
Dr. Quentin D. Young

Enclosure

[33a]

[The New York Times, Monday, February 10, 1969]

Dow Recruiters Try A New Tactic; Hope To Counter Protests on Campus Over Napalm

(By Jerry M. Flint, Special to The New York Times)

Detroit, Feb. 8—For recruiters of the Dow Chemical Company it's that time again—when they pack ham sandwiches in their briefcases.

The 1969 college recruiting season is starting and the sandwiches are no joke. Harvard holds the inter-collegiate record for imprisoning a Dow recruiter seven hours. But after one week and five campus visits in the new season the Dow men do not have a campus demonstration to their credit.

One was scheduled in Oregon last week but a snowstorm canceled the recruiting and the protest, Dow said. The protests have arisen because the company makes napalm, a flammable compound used in the Vietnam war.

Dow is now more concerned with rebuilding its campus image and has gone into what it calls "phase three" of its public relations effort to counter the napalm publicity. Its officials also believe demonstrators may be turning to "secondary targets" or other companies for future attacks.

"We've become one of the best known companies in America," said Ellis Brandt, the company's public relations director, as he explained Dow's strategy to fellow publicists last week.

CAMPUS FIGURE CITED

"Ninety per cent of the campus population can tell you Dow makes napalm. Two years ago it was less than 1 per cent."

While the company insists it has lost neither business nor employees because of the demonstrations, Mr. Brandt said:

"What we are afraid of is that we may be losing the more sensitive and creative employes. Those are just the ones you want."

In phase three, Dow is trying to carry out a "business-student dialogue" in student newspaper advertisements. The company brought college newspaper editors to its Midland, Mich., headquarters in the fall for talks with Dow executives.

The company does not claim any converts but says it may be winning the respect of campus leaders.

Joel R. Kramer, who made the trip to Midland for The Harvard-Crimson, wrote in his paper:

"What was most irritating about their collective stand was the unstated premise that anything you do is all right, provided you are willing to talk about it. It was a gap between people who enjoyed working for a profit, who accepted money flow as a measure of their success, and people like me who felt uncomfortable all day with the idea."

After a two-hour meeting with Dow's president "most of the editors remained confused as to the clarity of Dow Chemical's policies," wrote Stan Chess in The Cornell Daily Sun, adding that most editors "felt that the explanations for policy were primarily defensive and were rarely the reasons employed in the actual decision making."

DIRECT DEBATE DEPLORED

Dow does not want direct debates on the campus, Mr. Brandt said, because sometimes this allows the Dow man to

become "trapped" into appearing to defend "the whole sorry mess of the war." He also noted two small recent demonstrations against other companies, Olin Mathieson and Litton Industries, as signs that the protesters may be moving "to secondary target companies."

Dow has counted 203 campus demonstrations against the company in the last three years plus several dozen more at plants, offices and foreign installations.

Phase one of Dow's public relations answer to the attacks was mainly an attempt to play down Dow's connection with napalm, Mr. Brandt said. The company put out a statement in the name of its president, Herbert Doan, saying Dow endorsed the right of protest but considered it "simple good citizenship" to supply the Government.

But phase one ended and phase two began in the fall, 1967, when the protests grew from picketing to "stopping what they called immoral acts," he said.

To answer the more violent protests, Dow began trying to "spot trouble in advance and going to meet it." This included trying to pick the campuses that would be the scene of violence, sending out a public relations advance man to talk to local news and college officials, leaving them a 12-page report on Dow's business plus reprints of articles with the military view on napalm and medical statements denying civilian casualties from the compound.

[34a]

THE DOW CHEMICAL COMPANY,
General Office Building, 2030 Abbott Road Center,
Midland, Michigan 48640, March 7, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Avenue,
Washington, D.C. 25049
Att'n: M. E. Jaffe, Esq.
Division of Corporation Finance

Re: *File No. 1-3433, The Dow Chemical Company*

GENTLEMEN: According to the records of our transfer agent, The Cleveland Trust Company, the Medical Committee for Human Rights first became a stockholder of record of The Dow Chemical Company with the transfer to it of its five shares on March 22, 1968.

The Medical Committee's Dow Common Stock was registered in its name eleven days after the Medical Committee's original letter to Dow of March 11, 1968, presenting a proposed amendment to the Composite Certificate of Incorporation prohibiting the sale of napalm by the Company.

The timing of the 1968 letter in relation to the date of acquisition of these shares (acquired by gift, according to the March 11, 1968, letter) clearly negates the genuineness of the declaration of concern for Dow's public image set forth in the Medical Committee's letters in 1968 and 1969. The status of the Company as a supplier of napalm to the United States Department of Defense was well known prior to March, 1968, and the Medical Committee acquired the shares of Dow stock with full knowledge of Dow's public image in this respect.

The Medical Committee itself admitted that it submitted its 1968 proposal primarily for the purpose of "Promoting general economic, political, racial, religious, social or similar causes" [Rule 14a–8(c)(2)] when it said in its March 11, 1968, letter

> "Finally, we wish to note that our objections to the sale of this product is primarily based on the concerns for human life inherent in our organization's credo. However, we are further informed by our investment advisers that this product is also bad for [35a] our company's business as it is being used in the Vietnamese War."

Mr. Quentin D. Young's January 6, 1969, letter to Mr. W. A. Groening, clearly indicates that the Medical Committee's 1969 request is a continuation of the 1968 request, and adds as an additional reason for its request the

> "even more compelling feature of peace negotiations, which may well make termination of the use of our products against humans a reality, at least in Vietnam."

This additional reason is clearly for the purpose of promoting a general political, social or similar cause.

Please feel free to call upon Mr. Groening or me at any time if the Commission needs any additional information or co-

operation from Dow to assist it in reaching a decision on this matter.

Very truly yours,

R. W. BARKER,
Assistant General Counsel.

cc: Dr. Quentin D. Young
Member, Executive Committee
Medical Committee for Human Rights
1512 East 55th Street
Chicago, Illinois 60615

[36a]

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549, March 14, 1969.

JEFFREY BAUMAN, ESQUIRE,
ARNOLD & PORTER,
1229 19th Street, Washington, D.C.

Re: *The Dow Chemical Company, File No. 1-3433*

DEAR MR. BAUMAN: Enclosed is a copy of our February 18, 1969 letter to Dow Chemical Company.

Sincerely yours,

WILLIAM E. TOOMEY,
Assistant Chief Counsel,
Division of Corporation Finance.

Enclosure

[37a]

ARNOLD & PORTER,
1229 Nineteenth Street, N.W., Washington, D.C. 20036.

March 17, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Street, N.W., Washington, D.C. 20549
(Attention: Courtney Whitney, Jr., Esq. Chief Counsel, Division of Corporation Finance)

GENTLEMEN: Enclosed is a letter concerning the resolution proposed by the Medical Committee for Human Rights for inclusion in the proxy statement of Dow Chemical Company

in connection with the forthcoming annual meeting of stockholders to be held on May 7, 1969. We hereby renew our request that the decision of the Division of Corporation Finance to permit Dow to exclude this proposal be reviewed by the Commission, and we respectfully request that the enclosed letter be sent in its entirety to the Commission together with whatever other material the Division may deem appropriate.

If you have any questions on this matter, please contact the undersigned.

Sincerely,

ARNOLD & PORTER
By JEFFREY D. BAUMAN.

Enclosure

[38a]

ARNOLD & PORTER,
1229 Nineteenth Street, N.W.,
Washington, D.C. 20036, March 17, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Street, N.W., Washington, D.C. 20549

GENTLEMEN: On March 7, 1969, the management of Dow Chemical Company submitted a letter to the Division of Corporate Finance, apparently in response to our letter to the Commission in this matter dated February 28, 1969. We believe that Dow's submission misconceives the issues presented for the Commission's decision.

In confining its response to making various allegations about the subjective motives of the shareholder in proposing the resolution for consideration at the annual meeting, Dow management does not meet the arguments made on page 5 of our letter of February 28, 1969. As we pointed out, a proposal cannot be excluded under Rule 14a–8(c)(2) at all unless it concerns a "*general* economic, political * * * cause." All corporate actions, of course, have economic, political, or social aspects and consequences. The phrase "general cause" in the Rule is necessarily a limiting term, and a term of art. Which shareholder proposals concern such *general* causes, and which do not, is determined by an objective test, as the background and history of the Rule make clear. That test, simply [39a] stated, is whether the proposal has to do with the direct business concerns of the shareholders *as shareholders,* that is, with matters over which the Corporation has control.

There can be no question that the shareholder proposal in question here meets this objective test. Unlike the proposed resolution "the antitrust laws and the enforcement thereof [should] be revised"—one of the examples of propositions "of a similar nature" in Securities Exchange Act Release No. 3638 which flesh out the term "general political [etc.] cause" in Rule 14a–8(c)(2) this proposal has to do with the most direct concern of all shareholders, the prospects for maximum profitability of the company in comparison with its competitors. The Company's management has declared to the shareholders:

> "[W]e as a company have made a *moral judgment* on the long-range goals of our government and we support these. * * * From a long range viewpoint *we could be hurt in many ways.*" (Statement by Dow President H. D. Doan. The Dow Diamond No. 4, 1967, attached as Annex A.) [Emphasis added]

Shareholder consideration of the advisability urging the preparation of an amendment to the Company's Certificate of Incorporation, to protect the Corporation from such economic harm incurred by reason of a moral judgment, is clearly proper. An amendment to its own certificate, defining the scope of its business operations, is clearly a matter over which the Corporation has control. Since the proposed resolution meets the initial test—that it not concern merely a *general* political, social or economic cause—it falls outside the exception defined in Rule 14a–8(c)(2), regardless of whether its subjective motivation, like that of Company management, is also moral.

Sincerely,

ARNOLD & PORTER

By JEFFREY D. BAUMAN.

cc: Mr. H.D. Doan, President,
Dow Chemical Company

[40a]

(In response to many inquiries concerning the production of napalm, Dow President H. D. Doan in this statement has outlined the company's position)

"DOW WILL DIRECT ITS EFFORTS TOWARD A BETTER TOMORROW"

(By H. D. Doan, *President*, The Dow Chemical Company)

A letter writer complained to a Chicago newspaper recently that The Dow Chemical Company was getting a million dollars

worth of free publicity from anti-war protests on college campuses.

This kind of publicity we don't need, for it fixes us in the public mind only as the company that makes napalm. There's a real risk, in fact, in the article which follows for it adds more mileage to what has already been a grossly overexposed subject. But the risk is worth it if we can clear up a few of the issues in the controversy which seems to swirl about our company.

Dow does make napalm under contract for the U.S. government and has done so for about three years. We did not develop the product. Napalm was first developed in 1942 and has been used in warfare by many nations since that time. Dow was asked to bid on a contract for its production in 1965 when the Air Force developed a new formulation incorporating polystyrene as a principal ingredient. Dow is a leading producer of polystyrene, a plastic raw material. There have been other producers of napalm but Dow at present is the only producer.

The contract has little economic significance to Dow. It amounted to less than one half of one percent of total sales last year—in the range of $5 million—and an even smaller percentage of total profits. This year it will be in the range of one-fourth of one percent and again a smaller percentage in profits. We are not a major [41a] defense contractor. All of our business to all branches of government comes to less than five percent of sales.

Why do we produce napalm? In simplest terms, we produce it because we feel that our company should produce those items which our fighting men need in time of war when we have the ability to do so.

A quarter of a century ago this answer would have satisfied just about anyone who asked this question. Today, however, it doesn't. Today we find ourselves accused of being immoral because we produce this product for use in what some people consider an unjust war. We're told that to make a weapon because you're asked to do so by your government puts you in precisely the same position as the German industrialists who pleaded at the Nuremberg Trials that they were "only following orders."

And these are just a few of the milder charges in a barrage of protest that has included picketing of some of our plants and sales offices, boycotts against our products, thousands of letters of protest to the company and to individuals within the com-

pany, and, most publicized of all, organized demonstrations on campuses across the nation which have ranged from peaceful protest to violence and physical obstruction of Dow job interviews.

"THERE COULD BE NO OTHER CHOICE * * *"

The central issue, of course, is the war in Vietnam. This is not a popular war. No one likes war, least of all the men who have the dirty and dangerous and heartbreaking job of having to fight it. All of the debate in the world about how we got there or how we get out is proper and right in its place but it doesn't change the fact that we are there nor the fact that our men are there and need weapons to defend themselves.

When Dow first began to face this protest movement, more than a year ago, our board of directors took another look at its original decision to make this product for our government. We discussed at great length among ourselves the very serious charges and protests against us and finally resolved that there could be no other choice but to continue making this product.

"MEN IN VIETNAM CONFIRM OUR REASON"

In recent weeks, since the increased publicity about campus protests against Dow, we've begun to hear from the men in Vietnam in letters that confirm our reason for this decision. A Congressional Medal of Honor winner has written, for instance, "War and killing is not at all pleasing to anyone. The infantry in Viet Nam fights to win and *stay alive*. We need and are thankful for napalm."

An army enlisted man writes: "The war would not end if companies such as yours suddenly refused to manufacture napalm and other military supplies."

An infantry captain: "Your napalm has saved the lives of countless American soldiers."

Fourteen GIs signed a letter including this comment: "The effectiveness of napalm in saving U.S. lives is overwhelming."

And a Marine Corps lieutenant: "War is never a pleasant form of existence, but we believe we are here to further the cause of peace, and stem the tide of communism. Napalm is just one of the instruments which we must use to support ourselves."

Protesters argue, however, that napalm is an immoral product in and of itself and that it is used indiscriminately against civilians in Vietnam. Many protest leaders will readily admit, in fact, that Dow has become a focal point for protest because of the emotions that can be aroused by napalm.

Secretary of Defense Robert S. McNamara has said of these charges in a recent letter to Dow, "The implication that napalm is used indiscriminately in Vietnam is not true. General Earle G. Wheeler, Chairman of the Joint Chiefs of Staff, has said publicly that napalm is a military necessity. It answers a specific military need in certain combat situations peculiar to the type of warfare practiced by the Viet Cong.

"General Wheeler has also pointed out that the precautions we take against injury by this weapon to noncombatants are as painstaking as we can make them without hamstringing our military operations," Secretary McNamara continued. "By contrast, the Viet Cong has repeatedly carried on terror and murder campaigns directed against innocent civilians."

"NAPALM ANSWERS MILITARY NEED"

Other sources, including combat veterans of Vietnam in their letters to us and in conversations with our people, add further confirmation to what General Wheeler has said.

[42a] But what of the argument that we are no different from the German industrialists who "just followed orders"?

We reject this argument on several points. First we reject the validity of comparing our present form of government with Hitler's Nazi Germany. In our mind our government is still representative of and responsive to the will of the people.

Further, we as a company have made a moral judgment on the long-range goals of our government and we support these. We may not agree as individuals with every decision of every military or governmental leader but we regard these leaders as men trying honestly and relentlessly to find the best possible solutions to very, very complex international problems. As long as we so regard them, we would find it impossible not to support them. This is not saying as the critics imply that we will follow blindly and without fail no matter where our government leads us. While I think it highly improbable under our form of government, should despotic leaders attempt to lead our nation away from its historic national purposes, we would cease to

support the government. But I can foresee this happening only if through resort to anarchy we prevent the functioning of democratic processes.

Our critics ask if we are willing to stand judgment for our choice to support our government if history should prove this wrong. Our answer is yes.

On the related issue of campus recruiting we feel that we have the right and the responsibility to meet on campus with students who want to discuss job opportunities with our company representatives. This is no sinister activity but rather a routine function, provided at most colleges for the mutual benefit of students and business, which allows large and small businesses an equal chance to make themselves available to interested students.

When college officials request us to postpone or cancel recruiting visits, of course, we do so. We have found, however, that college officials in general have been extremely helpful and cooperative despite the problems which have arisen on various campuses.

"WE ARE WILLING TO STAND JUDGMENT"

Has Dow been hurt by the various kinds of protests? This is difficult to answer without qualification. We can detect no effect on our sales, for example. And early in the recruiting season our number of interviews was up sharply. These are still running ahead of a year ago. We can detect no decline in the quality of students with whom we conduct interviews. And while we have had some stockholders sell their Dow stock in protest to our stand on this issue, we can't really gauge the effect in this area.

Yet in the minds of some people we are becoming the company that produces napalm rather than a highly diversified company producing more than 800 products basic to all other industries and ranging from measles vaccine to brake fluids and antifreezes. There may be outstanding businessmen or scientists of the future who have been lost to Dow because of deep personal feelings on this matter or simply because somehow they were deprived of the chance to talk to our representative. From a long-range [43a] viewpoint we could be hurt in many ways.

We point this out not in a plea for sympathy but as a simple fact. Certainly no problem we face now and in the future can compare to those faced by the men who are fighting this war and by their families.

But there may also be in this situation both for Dow and for business in general some very real opportunities. One of these may be a start toward more meaningful dialogue between business and the campus and other groups who have joined in this protest.

Basically the debate over Vietnam, as long as it remains peaceful and honest debate, is a healthy thing. And many of the questions being asked are pertinent questions which business must ask itself. Business should and must be willing to discuss some of these questions with the campus and intellectual community which has raised them—discuss them not in the emotional atmosphere of demonstrations and confrontations but under conditions which will allow a true dialogue. The issue of business making moral judgments, the issue of duty to country deserve thoughtful discussion. This is not to say that business can or should debate specific U.S. foreign policy decisions.

"WE MUST FOCUS ATTENTION ON PEACE"

Equally important, however, is the challenge to Dow and to the business world to focus attention and action on an issue far more vital than Vietnam. That issue is peace itself, the lasting peace that man has sought throughout history. Such a lasting peace can be achieved only when we find solutions to such basic world problems as hunger and disease and lack of economic opportunity.

We need to change wild jungles to productive croplands, to increase crop yields and find better ways to process and preserve the crops that are abundant, to increase meat production efficiency, to improve our recovery of natural mineral or petroleum resources, to bring industry to undeveloped lands and thus provide an economic base for sound growth, to help clean up and protect valuable water resources threatened by pollution, to bring the rest of the world's standard of living closer to our own.

These are things that Dow is working on right now—things on which we spend far more time and money and effort than we spend on the production of napalm. We intend to continue making napalm because we feel that so long as the United States is sending men to war it is unthinkable that we would not supply the materials they need. But we also intend to con-

tinue to direct our talents and efforts toward that better tomorrow for all mankind that can build lasting peace.

This we feel is the real challenge of business that calls for the kind of dedication and zeal and concern for mankind that is being manifested in much of this campus protest. We firmly believe that the young men and women truly concerned about doing something to build a better world rather than just talking about it are in the vast majority. We intend to make every effort to convince them that the business world offers one of the best opportunities to do that job effectively.

Why Dow Recruits on College Campus

The target of most anti-war protests against Dow has been the recruiting representative sent to a college to interview students interested in talking about a job with the Company.

The Dow recruiting staff consists of 15 full-time men plus 250 technical and professional employees who take about a week from their regular jobs to interview students on campus.

This school year the recruiting staff will visit 330 colleges and universities and conduct more than 11,000 interviews.

This extensive and highly organized activity is an indication of the highly competitive nature of acquiring college trained talent; an almost complete reversal of the traditional hiring practices of 20 or more years ago.

Prior to the end of World War II, most graduating students would write to companies in which they were interested. Few firms bothered to send a representative to campuses or actively solicited interviews.

In recent years demand for college graduates, particularly in the technical disciplines, has soared. At the same time, the number of B.S.-level graduates available for employment in industry has dwindled; larger proportions are going on to higher degrees or going into teaching or government jobs.

For example, in a recent year there were less than 4,000 chemical engineers graduating at the B.S. and M.S. levels in the U.S. Of these, less than 2,400 were available for employment because of graduate school, military commitment and other reasons.

One result of this trend: at one Big Ten school last year, more than 2,000 employers sent representatives to the campus and conducted 18,000 interviews.

Another result has been the growing need for the professional college placement officer. The placement officer helps faculty

members by relieving them of the extra curricular chore many of them had acquired of serving as a contact between students and employers. He helps students by setting up a central, convenient location for scheduling and conducting interviews. He helps employers by setting up schedules, providing a mutually convenient location and screening out obviously unqualified candidates (e.g., sophomores and juniors).

In the process, the placement officer also performs a valuable guidance and career counseling service which has undoubtedly helped many youngsters to avoid costly career mistakes. The placement officer has also been able to raise and enforce ethical standards of interviewing and hiring on the part of employers.

Because of the professional nature of the college placement function and the important role it plays in maintaining high standards in the recruiting process, Dow's Corporate Recruiting Department is firmly committed to supporting placement officers and to conducting its college interviews through the official campus placement centers.

[44a]

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549, April 2, 1969.

JEFFREY D. BAUMAN, Esq.,
Messrs. ARNOLD & PORTER,
1229 Nineteenth Street, NW., Washington, D.C. 20036
Re: The Dow Chemical Company
File No. 1–3433

DEAR MR. BAUMAN: This is with respect to the inclusion in the proxy statement of The Dow Chemical Company for the 1969 annual meeting of shareholders of a proposal concerning an amendment to the Company's Composite Certificate of Incorporation to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings which was submitted by the Medical Committee for Human Rights in a letter to Dow Chemical Company dated January 6, 1969 and the alternative proposal requesting that the Board of Directors of the Company consider the advisability of adopting a resolution setting forth an amendment to the Composite Certificate of Incorporation that the Company shall not make napalm which was submitted by the Medical Committee for Human Rights to Dow Chemical Company on February 7, 1969.

The Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised if the Company omits the proposals from its proxy statement for the forthcoming meeting of shareholders.

Very truly yours,

COURTNEY WHITNEY, Jr.,
Chief Counsel,
Division of Corporation Finance.

[45a]

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549, April 2, 1969.

W. A. GROENING, Jr., Esq.,
General Counsel, The Dow Chemical Company,
2030 Abbott Road Center, Midland, Michigan 48640
Re: File No. 1–3433

DEAR MR. GROENING: This is with respect to the inclusion in the proxy statement of The Dow Chemical Company for the 1969 annual meeting of shareholders of a proposal concerning an amendment to the Company's Composite Certificate of Incorporation to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that this substance will not be used on or against human beings which was submitted by the Medical Committee for Human Rights in a letter to the Company dated January 6, 1969 and the alternative proposal requesting that the Board of Directors of the Company consider the advisability of adopting a resolution setting forth an amendment to the Composite Certificate of Incorporation that the Company shall not make napalm which was submitted by the Medical Committee for Human Rights on February 7, 1969.

The Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised if the subject proposals are omitted from the Company's proxy statement for the forthcoming annual meeting of shareholders.

Very truly yours,

COURTNEY WHITNEY, Jr.,
Chief Counsel,
Division of Corporation Finance.

[46a]

10:00 A.M. MARCH 24, 1969.

Re: Dow Chemical Company, (File 1–3433)

Reference was made to proxy material filed pursuant to Regulation 14 of the Rules and Regulations under the Securities Exchange Act of 1934 by Dow Chemical Company (File 1–3433) for use in connection with its annual meeting of stockholders scheduled for May 7, 1969.

Upon the recommendation of the Division of Corporation Finance contained in two memoranda dated March 18, 1969, the Commission determined to raise no objection to the omission from the management's proxy statement of certain resolutions proposed by the Medical Committee for Human Rights. The Commission also denied the request of counsel for the Committee to be heard by the Commission in the matter.

ORVAL L. DUBOIS, *Secretary.*

United States Court of Appeals for the District of Columbia Circuit

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

against

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

MOTION TO DISMISS PETITION FOR REVIEW

The Securities and Exchange Commission respectfully moves this Court for an order dismissing the petition for review filed by the Medical Committee for Human Rights because this Court lacks jurisdiction:

1. The Medical Committee is not a person aggrieved by any order issued by the Commission in a proceeding under the Securities Exchange Act to which the Medical Committee is a party;

2. The petition for review relates solely to matters committed to Commission discretion by law;

3. The Medical Committee has suffered no legal wrong because of Commission action nor has it been adversely affected or aggrieved by Commission action within the meaning of any relevant statute;

4. Even if it were assumed that the matters raised by the petition are proper subjects for judicial review, this Court is not a court of competent jurisdiction under any relevant statute.

Respectfully submitted,

DAVID FERBER,
Solicitor.
RICHARD E. NATHAN,
Attorney.
SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C. 20549.

Washington, D.C.
July 8, 1969

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1969

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

Before: McGowan, Tamm and Leventhal, Circuit Judges, in Chambers.

ORDER

This cause came on for consideration on respondent's motion to dismiss the petition for review herein, and the Court heard argument of counsel. On consideration thereof, it is

ORDERED by the Court that respondent's aforesaid motion to dismiss is denied without prejudice to renewal thereof in the briefs and at the argument on the merits.

Per Curiam.

Circuit Judge Tamm would grant respondent's motion to dismiss.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

AFFIDAVIT

CITY OF WASHINGTON,
District of Columbia, ss:

MATTHEW E. JAFFE, being duly sworn, deposes and says:

(1) I am an attorney employed in the Division of Corporation Finance of the Securities and Exchange Commission since April 1967, and in the course of such employment I have become familiar with the facts underlying this proceeding.

(2) On March 24, 1969, Courtney Whitney, Jr., Chief Counsel of the Division of Corporation Finance, instructed me to inform by telephone counsel for Dow Chemical Company ("Dow") and the Medical Committee for Human Rights ("Medical Committee") of the Commission's determination that day not to take any action if a certain proposal of the Medical Committee were omitted from Dow's proxy statement in connection with Dow's 1969 annual meeting. That same day, I called Mr. Jeffrey Bauman, counsel to the Medical Committee, and Mr. Walter Groening, counsel to Dow, and informed them of the Commission's determination. Subsequently, letters noting the Commission's determination were sent to these gentlemen.

(3) Further affiant sayeth not.

MATTHEW E. JAFFE.

Sworn to before me this 18th day of December, 1969.

JUANITA L. WARD,
Notary Public.

My Commission Expires May 31, 1974.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

Petition for Review of an Order of
the Securities and Exchange Commission

Decided July 8, 1970

Mr. Roberts B. Owen, with whom *Messrs. Edwin M. Zimmerman, Richard B. Herzog* and *Paul S. Hoff* were on the brief, for petitioner.

Mr. Richard E. Nathan, Special Counsel, Securities and Exchange Commission, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Messrs. Philip A. Loomis Jr.,* General Counsel, and *David Ferber,* Solicitor, Securities and Exchange Commission, were on the brief, for respondent.

Before McGOWAN, TAMM, and ROBINSON, *Circuit Judges.*

TAMM, *Circuit Judge*: The instant petition presents novel and significant questions concerning implementation of the concepts of corporate democracy embodied in section 14 of the Securities Exchange Act of 1934, and of the power of this court to review determinations of the Securities and Exchange Commission made pursuant to its proxy rules. For reasons to be stated more fully below, we hold that the Commission's action in the present case is reviewable, and that the cause must be remanded for further administrative proceedings.

I. PROCEDURAL HISTORY OF THE CASE

On March 11, 1968, Dr. Quentin D. Young, National Chairman of the Medical Committee for Human Rights, wrote to the Secretary of the Dow Chemical Company, stating that the Medical Committee had obtained by gift several shares of Dow

stock and expressing concern regarding the company's manufacture of the chemical substance napalm.[1] In part, Dr. Young's letter said:

> After consultation with the executive body of the Medical Committee, I have been instructed to request an amendment to the charter of our company, Dow Chemical. We have learned that we are technically late in asking for an amendment at this date, but we wish to observe that it is a matter of such great urgency that we think it is imperative not to delay until the shareholders' meeting next year. * * *
>
> We respectfully propose the following wording to be sent to the shareholders:
>
> > "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

(App. 1a–2a.) The letter concluded with the following statement:

> Finally, we wish to note that our objections to the sale of this product [are] primarily based on the concerns for human life inherent in our organization's credo. However, we are further informed by our investment advisers that this product is also bad for our company's business as it is being used in the Vietnamese

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[1] Napalm is described as follows in 15 ENCYCLOPAEDIA BRITANNICA 1170 (1968):

> [T]he aluminum soap of naphthenic and palmitic acids which, when mixed with gasoline, forms a sticky sirup used in chemical warfare.
>
> In World War I both Germany and the Allies used raw gasoline in flame throwers * * * but it burned too quickly to be fully effective. What was needed was a thickener that would slow down the rate of burning and increase the range of the weapon. Napalm did this, and it also greatly raised the temperature at which the fuel burned. Harvard university scientists, in cooperation with the U.S. army chemical warfare service, developed the substance in 1942.

> War. It is now clear from company statements and press reports that it is increasingly hard to recruit the highly intelligent, well-motivated, young college men so important for company growth. There is, as well, an adverse impact on our global business, which our advisers indicate, suffers as a result of the public reaction to this product.

(App. 2a.) Copies of this letter were forwarded to the President and the General Counsel of Dow Chemical Company, and to the Securities and Exchange Commission. (App. 3a.)

By letter dated March 21, 1968, the General Counsel of Dow Chemical replied to the Medical Committee's letter, stating that the proposal had arrived too late for inclusion in the 1968 proxy statement, but promising that the company would "study the matter and * * * communicate with you later this year" regarding inclusion of the resolution in proxy materials circulated by management in 1969. (App. 4a.) Copies of this letter, and of all subsequent correspondence, were duly filed with the Commission.

The next significant item of record is a letter dated January 6, 1969, noting that the Medical Committee was "distressed that 1968 has passed without our having received a single word from you on this important matter," and again requesting that the resolution be included in management's 1969 proxy materials. (App. 7a–8a.) The Secretary of Dow Chemical replied to this letter on January 17, informing the Medical Committee that Dow intended to omit the resolution from its proxy statement and enclosing an opinion memorandum from Dow's General Counsel, the contents of which will be discussed in detail in part III, *infra*. (App. 9a–12a.) On February 3 the Medical Committee responded to Dow's General Counsel, asserting that he had misconstrued the nature of their proposal in his opinion memorandum, and averring that the Medical Committee would not "presume to serve as draftsmen for an amendment to the corporate charter." (App. 15a.) The letter continued:

> We are willing to bend * * * to your belief that the management should be allowed to decide to whom and under what circumstances it will sell its products. Nevertheless, we are certain that you would agree that the company's owners have not only the legal power but also the historic and economic obligation to determine what

products their company will manufacture. Therefore, [we submit] * * * our revised proposal * * * requesting the Directors to consider the advisability of adopting an amendment to the corporate charter, forbidding the company to make napalm (any such amendment would, of course, be subject to the requirements of the "Defense Production Act of 1950," as are the corporate charters and management decisions of all United States Corporations), [and] we request that the following resolution be included in this year's proxy statement:

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws [*sic*] of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm."

(App. 16a.) On the same date, a letter was sent to the Securities and Exchange Commission, requesting a staff review of Dow's decision if it still intended to omit the proposal, and requesting oral argument before the Commission if the staff agreed with Dow. (App. 17a.)

On February 7, 1969, Dow transmitted to the Medical Committee and to the Commission a letter and memorandum opinion of counsel, which in essence reiterated the previous arguments against inclusion of the proposal and stated the company's intention to omit it from the proxy statement. (App. 18a–19a.) Shortly thereafter, on February 18, 1969, the Commission's Chief Counsel of the Division of Corporation Finance sent a letter to Dow, with copies to the Medical Committee, concluding that "[f]or reasons stated in your letter and the accompanying opinion of counsel, both dated January 17, 1969, this Division will not recommend any action * * * if this proposal is omitted from the management's proxy material * * *." (App. 20a.) In a letter dated February 28—which contains the first indications of record that petitioners had retained counsel—the Medical Committee again renewed its request for a Commission review of the Division's decision. (App. 24a.) On the same day, the Medical Committee filed with the Commission a memorandum of legal

arguments in support of its resolution, urging numerous errors of law in the Division's decision. (App. 26a–32a.) Several other documents were filed by both the company and the Medical Committee; finally, on April 2, 1969, both parties were informed that "[t]he Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised if the Company omits the proposals from its proxy statements for the forthcoming meeting of shareholders." (App. 44a–45a.) The petitioners thereupon instituted the present action, and on July 10, 1969, the Commission moved to dismiss the petition for lack of jurisdiction. On October 13 we denied the motion "without prejudice to renewal thereof in the briefs and at the argument on the merits."

In its briefs and oral argument, the Commission has consistently and vigorously urged, to the exclusion of all other contentions, that this court is without jurisdiction to review its action. We find this argument unpersuasive.

II. Jurisdiction to Review

A. TIMELINESS

The Commission's first argument on the jurisdictional point is that the instant petition was untimely filed, thereby depriving this court of power to adjudicate the controversy. This argument is based upon the provision of section 25(a) of the Securities Act, 15 U.S.C. § 78y(a)(1964), which requires that a petition for review must be filed "within sixty days after the entry" of a Commission order.

In the instant case the Commission's minutes reflect that the decision which was reached after reviewing the petitioner's proxy claim was made on March 24, 1969 (App. 46a), whereas the petition to review in this court was not filed until May 29, 1969—some 66 days thereafter. It also appears uncontroverted that the Commission gave the Medical Committee some notification by telephone on March 24 that a decision had been reached, although the substance of this conversation is not reproduced in the briefs or record. (*Cf.* Supp. App. 3.) However, as we noted in the preceding section, petitioners did not receive any written information concerning the Commission's decision until a letter was mailed to them on April 2; in addition, the Medical Committee has asserted, without contradiction, that the Commission temporized for approximately four weeks after

the petitioner requested a formal copy of the minutes of the decision, before making this important information available. (Reply Brief for Petitioner at 14 n.2 and accompanying text.)

It must be noted that the Commission is itself rather untimely in making this assertion of untimeliness, for in its July 10 Motion to Dismiss it explicitly disclaimed any intention to press upon us an argument relating to the time of filing the instant petition.[2] This resolve apparently fell by the wayside, however, and the timeliness argument appeared in full dress in the Commission's responsive brief on the merits, thereby helping to trigger further rounds of briefing by both sides. We need not elevate the Commission's vacillation to the status of a waiver, however, because we have concluded that its timeliness argument must fail on the merits.

The Commission relies primarily upon section 22(k) of its Rules of Practice, 17 C.F.R. § 201.22(k) (1970), which provides:

> In computing any period of time involving the date of the entry of an order by the Commission, the date of entry shall be (1) the date of the adoption of the order by the Commission * * * or (2) in the case of orders reflecting action taken pursuant to delegated authority, the date when such action is taken * * *. *The order shall be available for inspection by the public from and after the date of entry, unless it is a non-public order. A non-public order shall be available for inspection from and after the date of entry by any person entitled to inspect it.* [Emphasis added.]

In essence, the Commission has taken the position that the date of decision, March 24, must be deemed the date of "entry" within the meaning of Rule 22(k), notwithstanding the language of the rule italicized above, and notwithstanding the fact that no written information regarding the basis of the decision was available until a substantial time after March 24.

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[2] Memorandum in Support of Respondent's Motion to Dismiss Petition for Review at 5 n.2:

> This court may, alternatively, be without jurisdiction based upon the Medical Committee's failure to file its May 29 petition to review "within sixty days after the entry of" the alleged order * * *. *We do not urge the point, however, since the Commission's staff did not advise the Medical Committee of the Commission's March 24 decision * * * until April 2 * * *.* [Emphasis added.]

None of the cases cited by the parties offers much guidance in resolving the particular timeliness question now before us:[3] however, we think it clear that Rule 22(k), together with the 60-day statutory period for filing petitions for review, evidences an attempt by Congress and the Commission to strike a balance between the need to have Commission orders operate with finality, and the aggrieved party's need to have both adequate notice of the substance of the decision, and sufficient time to prepare his petition.[4] To hold that the running of the 60-day period can be initiated by a mere telephone call, as the Commission urges, would create risk of inequity and hardship to aggrieved parties and defeat the goal of orderly and open administrative procedures embodied in the italicized portions of Rule 22(k) quoted above. Therefore, we conclude that the instant petition for review is not barred for reasons of untimeliness.

B. THE EXISTENCE OF A REVIEWABLE ORDER

The most difficult problems presented by this case arise from a congeries of related arguments supporting the general assertion that the Commission's decision regarding the Medical Committee's proxy proposal is not a reviewable order within the relevant jurisdictional statute. That statute is section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a) (1964), which in pertinent part states:

> Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which

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[3] Lile v. SEC, 324 F.2d 772 (9th Cir. 1963), which seems most directly apposite to the facts of the instant case, was decided prior to the adoption of the present version of Rule 22(k). *See* 29 Fed. Reg. 3424 (1964). Moreover, the discussion of the timeliness problem in *Lile* appears to be dictum, since the case was decided on the ground of exhaustion of administrative remedies. However, to the extent that the discussion in *Lile* is useful to elucidate the present inquiry, it militates against the Commission's argument: the text of that opinion clearly reflects the court's concern that orders which assertedly had the effect of starting the running of the 60-day review period were not readily available for public inspection. *See* 324 F.2d at 773.

M. G. Davis & Co. v. Cohen, 256 F.Supp. 128 (S.D.N.Y.), *aff'd*, 369 F.2d 360 (2d Cir. 1966), which the Commission relies upon, is distinguishable in that it involved a different provision of the Rules of Practice which governed the issuance of orders initiating administrative proceedings and which did not include language comparable to that contained in Rule 22(k) relating to the parties' immediate right to inspect orders affecting them.

[4] For a discussion of an analogous problem of computation arising under the Federal Rules of Civil Procedure, *see* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 632–42 (1969).

> such person is a party may obtain a review of such order * * * in the United States Court of Appeals for the District of Columbia [Circuit], by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part.

Neither precedent [5] nor the legislative history of the Securities Act [6] offers an unambiguous answer to the question of whether decisions of the kind presently before us should be categorized as reviewable orders under this provision; thus, we must resort to general principles and analogies in determining whether we have jurisdiction to adjudicate this controversy.

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[5] Dicta in a few cases and remarks by some scholarly commentators tend to indicate that it has generally been assumed that proxy decisions like the present one are not reviewable by the courts. *See, e.g.*, Klastorin v. Roth, 353 F.2d 182, 183 n.2 2d Cir. 1965; Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 N.D. LAWYER 13, 17 (1964). However, we have found no holding that proxy decisions like the present one are unreviewable, and no adequate analysis of the myriad arguments bearing on the jurisdictional question.

[6] The absence of any indication in the legislative history that Congress intended to preclude review serves to distinguish the instant controversy from Schilling v. Rogers, 363 U.S. 666 (1960), which the Commission heavily relies upon. *See, e.g.*, 363 U.S. at 671:

> The only express provision in the Trading with the Enemy Act for recourse to the courts by those claiming the return of property vested during World War II is that contained in § 9(a). That section, however, is applicable only to persons not enemies or allies of enemies as defined in the relevant statutes, and hence is not available to this petitioner, an enemy national. * * *
>
> The question then is whether a right to such relief can fairly be implied * * *. The terms of § 32 and its legislative history speak strongly against any such implication.

Cf. Heikkila v. Barber, 345 U.S. 229, 233 (1953): "Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action. Mere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it."

The *Schilling* case is further distinguishable because the administrative action there in issue was found to be wholly within the province of administrative discretion; *see* 363 U.S. at 674. As will be developed more fully below, we do not find the discretionary aspects of the Commission's action preclusive of review in the present controversy. Finally, it must be noted that the subject matter of the regulatory scheme in *Schilling* was permeated with overtones of foreign affairs and national defense policy—considerations which have always made the courts reluctant to review administrative action, and which obviously are totally lacking here. *See, e.g.*, Curran v. Laird, —— U.S.App.D.C. ——, 420 F.2d 122 (1969) (*en banc*).

Bypassing for the moment the question of whether deference to administrative discretion should compel us to foreclose review of this petition,[7] we begin by restating the well-established principle that there is a strong presumption in favor of the courts' power to review administrative action. As the Supreme Court concluded in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), "[A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." This theme has been developed at greater length by Professor Jaffe in his study of the law of reviewability:

> Congress, barring constitutional impediments, may indeed exclude judicial review. But judicial review is the rule. * * * It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest. * * *
>
> * * * * *
>
> * * * The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.

L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 346, 357 (1965) [hereinafter "L. JAFFE"]. *See also Environmental Defense Fund, Inc. v. Hardin*, No. 23,813 (D.C. Cir. May 28, 1970) (slip op, at 7); *Scanwell Laboratories, Inc. v. Thomas*, No. 22,863 (D.C. Cir. Feb. 13, 1970); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 1–32 (1958).

Several other general observations which we have gleaned from our perusal of numerous cases and commentaries on reviewability must serve as prolegomena to our discussion of that issue in the present case. It appears that the factors most often relied upon in determining whether a particular administrative action is a reviewable order can be subdivided

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[7] *See* part II C, *infra*. Schilling v. Rogers, 363 U.S. 666 (1960), which is discussed in the preceding footnote, clearly indicates that the issue of whether particular administrative action is rendered unreviewable by implication of a statute or by pragmatic concerns should be considered a different inquiry from the question of whether agency discretion precludes review.

into two general categories. The first of these basic areas of concern involves consideration of whether the administrative action operates with final effect upon a particular individual, entity, or group.[8] *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Isbrandtsen Co. v. United States*, 93 U.S. App.D.C. 293, 298, 211 F.2d 51, 55, *cert. denied*, 347 U.S. 990 (1954); L. JAFFE, 358, 403–404. The second line of analysis looks to the formalities preceding and attending the administrative action, for, as one commentator has stated, "the notion of an 'order' implies some formal characteristics." L. JAFFE 419, *cf. Helco Products Co. v. McNutt*, 78 U.S.App.D.C. 71, 137 F.2d 681 (1943); *American Sumatra Tobacco Corp. v. SEC*, 68 App.D.C. 77, 93 F.2d 236 (1937). Finally, the cases in the area seem virtually unanimous in proclaiming that pragmatic considerations, particularly those relating to the institutional relationships between the courts and the administrative agencies, must prevail over purely doctrinal arguments for or against reviewability. *See, e.g., Abbott Laboratories, supra*, 387 U.S. at 149; *American Federation of Labor v. NLRB*, 308 U.S. 401, 408 (1940); *Cities Service Gas Co. v. FPC*, 255 F.2d 860, 862 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958); *Isbrandtsen Co., supra*, 93 U.S.App.D.C. at 297, 211 F.2d at 55.

While the problem of whether there is sufficient formality is admittedly difficult in the present case, we need not pause long over the question of the decision's final effect upon petitioner. Here the administrative process had run its course with respect to petitioner's proxy proposal, and there can be no basis for any fear that review of the decision would cause the courts "to interfere in matters yet within the consideration of the Commission." *Cities Service Gas Co., supra*, 255 F.2d at 862. Here, also, we are dealing with a limited and easily identifiable class of individuals—shareholders of a regulated corporation—whom Congress sought to protect in section 14 of the Act, and who claim that they are wrongfully being denied fair corporate suffrage by the Commission's approval of Dow's decision to omit their proposal. *Cf.* Jaffe, *The Individual Right to Initiate Administrative Process*, 25 IOWA L.REV. 485, 528 (1940). In this regard, we cannot see any merit in the Commission's contention

[8] Frequently these considerations are analyzed under one or more of the related doctrines of ripeness, finality, and exhaustion of administrative remedies; however, it is not uncommon to find these factors treated under the more general rubric of reviewability.

that the petitioner has not suffered any "aggrievement" under the jurisdictional statute because it may still have relief through a private action against the company in a district court. The relevance of a possible private action will be examined more fully later in this portion of our opinion. For present purposes, it is sufficient to note that the Medical Committee has been forced to undergo a two-stage administrative proceeding, compelled by the risk that failure to do so would preclude any judicial relief by virtue of the exhaustion doctrine;[9] its recourse to an authoritative judicial determination of the merits of its proxy proposal has been substantially delayed because of the administrative proceeding, whereas time is clearly of the essence in proxy contests; and not only has the Medical Committee lost the potential benefit of the Commission's resources and expertise as an ally in compliance litigation against the company, it has also had imposed upon it the added burden in a private action of overcoming an adverse Commission determination in face of the principle that the agency is entitled to judicial deference in the construction of its proxy rules. *See, e.g., Union Pacific R. Co. v. Chicago & N.W. Ry. Co.*, 226 F.Supp. 400, 408 (N.D.Ill. 1964). Moreover, we believe that there is a substantial public interest in having important questions of corporate democracy raised before the Commission and the courts by interested, responsible private parties. *Cf. Scanwell Laboratories, Inc. v. Thomas*, No. 22,863 (D.C. Cir. Feb. 13, 1970) (slip op. at 8–10); *Environmental Defense Fund, Inc. v. Hardin*, No. 23,813 (D.C. Cir. May 28, 1970) (slip op. at 5–7). Thus, we conclude that the Medical Committee is "aggrieved" for purposes of section 25(a) of the Act.

Finally, in the context of assessing the reviewability of the Commission's decision—as distinguished from our later inquiry into the scope of administrative discretion—it is clear that no significance whatsoever inheres in the fact that the administrative determination is couched in terms of a "no action" decision rather than in the form of a decree binding a party to perform or refrain from some particular act. This much has been clear ever since the Supreme Court interred the discredited "negative order doctrine" in *Rochester Telephone Corp. v. United States*.[10] That case, like the present controversy, in-

[9] *See* Peck v. Greyhound Corp., 97 F.Supp. 679 (S.D.N.Y. 1951).

[10] 307 U.S. 125 (1939). *See generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 87–93 (1958).

volved a petitioner's attempt to obtain judicial review of "action by the Commission which affects the complainant because it does not forbid or compel conduct with reference to him by a third person." (307 U.S. at 135.) The Court pointed out that "[n]egative has really been an obfuscating adjective" because it failed to illuminate "the real considerations on which rest * * * the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability." (307 U.S. at 141.) The Court then concluded:

> An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. * * * Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. * * * But this bears on the disposition of a case and should not control jurisdiction.

(307 U.S. at 142.) Similarly, section 10(e) of the Administrative Procedure Act provides judicial relief for "agency action unlawfully withheld or unreasonably delayed" (5 U.S.C. §706(1) (Supp. V 1965–69)), and the courts have had little difficulty in determining when an administrative failure to act presents an appropriate occasion for judicial scrutiny. *Compare Environmental Defense Fund v. Hardin, supra, with International Ass'n of Machinists v. NMB*, No. 23,409 (D.C. Cir. Jan. 30, 1970); *see generally* Goldman, *Administrative Delay and Judicial Relief*, 66 MICH.L.REV. 1423 (1968). Thus, there can be little doubt that the Commission's decision operates with sufficient particularity and finality to warrant judicial review.

The question of whether the procedures attending the Commission's decision in this case are sufficiently formal to make the determination a reviewable order under section 25(a) is admittedly a close one, but we believe that the considerations militating in favor of reviewability must prevail. At the outset, we note that the decided cases make it clear beyond doubt that the absence of a formal evidentiary hearing does not compel the conclusion that an administrative decision is unreviewable. *See, e.g., Cities Service Gas Co. v. FPC*, 255 F.2d 860, 862–63 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958); *Phillips Petroleum Co. v. FPC*, 227 F.2d 470, 475 (10th Cir. 1955), *cert.*

denied. 350 U.S. 1005 (1956); *Isbrandtsen Co. v. United States*, 93 U.S.App.D.C. 293, 297, 211 F.2d 51, 55, *cert. denied*, 347 U.S. 990 (1954). This is a sound and necessary doctrine because agencies frequently are confronted with situations in which substantial questions of fact, law or policy may be properly resolved through information-gathering mechanisms less cumbersome than a trial-type hearing. This court has consistently recognized that this kind of flexibility in procedures is a desirable attribute of the administrative process, regardless of whether the power was explicitly provided by statute or rule, or was evolved on an ad hoc basis by implication from a broad statutory grant. However, our deference to the efficient deployment of administrative resources has not been—and logically could not be—considered a matter which touches upon the courts' jurisdiction to review the action in question, in the absence of a clear indication that Congress intended such a result. *See generally, National Air Carrier Ass'n v. CAB*, No. 23,012 (D.C.Cir. May 28, 1970); *H & B Communications Corp. v. FCC*, No. 22,685 (D.C.Cir. Nov. 13, 1969); *Marine Space Enclosures, Inc. v. FMC*, —— U.S.App.D.C. ——, 420 F.2d 577 (1969). Thus, we must look to the Commission' rules and to the attributes of the proceeding here in issue in order to determine whether this is an appropriate occasion for review.

Although the line is not drawn with complete clarity, the Commission's Rules of Practice distinguish between "formal" and "informal" proceedings. Procedures denominated "informal" by the Commission generally involve negotiation between the Commission and one private party, and normally culminate in a letter of advice to the party from a Commission staff member.[11] Here, however, there is an important difference which the Commission readily concedes:

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[11] 17 C.F.R. § 202.1 (1970) provides:

> The statutes administered by the Commission provide generally (1) for the filing with it of certain statements, such as * * * proxy solicitation material * * *; (2) for Commission determination through formal procedures of matters initiated by private parties or by the Commission; (3) for the investigation and examination of persons and records where necessary to carry out the purposes of the statutes * * *.
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> * * * * * *
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> (c) ***The statutes and the published rules, regulations and forms thereunder prescribe the course and method of formal procedures to be followed in Commission proceedings.*** These are supplemented where

> The difference is that in the normal no-action situation, there is only one interested private party and accordingly the Commission has not found it necessary to prescribe any rules dealing with the situation. The private party simply writes a letter which is answered.
>
> In the case of stockholder proposals, there are two interested private parties: the management and the shareholder. Consequently, Rule 14a–8(d) provides a procedure by which the position of both may be brought to the Commission's attention.

(Supplementary Memorandum of Respondent at 10.) Thus, the Commission's procedural regulations governing proxy proposals incorporate the basic theory of an adversary encounter, and a detailed perusal of Rule 14a–8 and its history reinforces this impression.

For the shareholder who wishes to have his proposal included in management's proxy statement, Rule 14a–8, 17 C.F.R. § 240.14a–8 (1970), is the touchstone of procedural and substantive rights. Rule 14a–8(a) describes the initiation of this process by providing that the security holder "shall submit to the management of the issuer, within the time hereinafter specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting." The basic time period established in this section is 60 days, subject to

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feasible by certain informal procedures designed to aid the public and facilitate the execution of the Commission's functions. * * *

(d) The informal procedures of the Commission are largely concerned with the rendering of advice and assistance by the Commission's staff to members of the public dealing with the Commission. [Emphasis added.]

Informal negotiation also plays a large role in Commission hearings which are indubitably formal in nature; *see, e.g.*, 17 C.F.R. § 202.4 (1970):

(a) Applications, declarations, and other requests involving formal Commission action after opportunity for hearing are scrutinized by the appropriate division for conformance with applicable statutory standards and Commission rules and generally the filing party is advised of deficiencies. * * *

(b) After the staff has had an opportunity to study an application or declaration, interested persons may informally discuss the problems therein raised to the extent that time and the nature of the case permit * * *.

(c) During the course of the hearings, the staff is generally available for informal discussions to reconcile bona fide divergent views not only between itself and other persons interested in the proceedings, but [also] among all interested persons; and, when circumstances permit, an attempt is made to narrow, if possible, the issues to be considered at the formal hearing.

certain qualifications. Subsection (b) then provides that if management opposes the shareholder's proposal, it must include in its proxy materials a 100-word statement by the proponent of the proposal. The substantive exceptions to the general rule of inclusion are then set forth in subsection (c), and several of these grounds for omitting a shareholder proposal will be discussed at length in part III, *infra*. The following provision, subsection (d), contains the procedural steps which are immediately relevant; it describes the course of proceedings which comes into play whenever management believes that it is entitled under the substantive criteria of the preceding section to omit a shareholder proposal.

Subsection (d) is phrased wholly in mandatory rather than permissive language. It requires management to "file with the Commission * * * a copy of the proposal and any statement in support thereof as received from the security holder, together with a statement of the reasons why the management deems such omission to be proper in the particular case, and, where such reasons are based on matters of law, a supporting opinion of counsel." At the same time, management must "notify the security holder submitting the proposal of its intention to omit the proposal" and "forward to him a copy of the statement of the reasons why the management deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel." This filing and forwarding must be completed "not later than 20 days prior to the date the preliminary copies of the proxy statement are filed pursuant to § 240.14a–6(a)"; this requirement was promulgated "[s]o that the Commission will have more time to consider the problems involved in such cases and the security holder will have an opportunity to consider the management's position and take such action as may be appropriate." 19 Fed. Reg. 246 (1954). Presumably this "other appropriate action" by the shareholder encompasses the possibility of filing with the Commission detailed legal arguments in favor of requiring the company to include the proposal, similar to the one which the Medical Committee filed with the Commission in the present case after the Division of Corporation Finance had made its recommendation, and which the Commission accepted without comment or objection. (App. 26a–32a; *see also id.* at 38a–39a.) Finally, the history of the rule explicitly states that it "places the burden of proof upon

the management to show that a particular security holder's proposal is not a proper one for inclusion in management's proxy material." (19 Fed. Reg. 246 (1954).)

We think that these provisions contain persuasive indicia that the Commission's proxy procedures are possessed of sufficient "adversariness" and "formality" to render its final proxy determinations amenable to judicial review, although the scope and content of that review must yet be investigated. This conclusion is inferentially supported by cases dealing with private actions to enforce the proxy rules, in which shareholders have been required to exhaust the administrative remedies provided by the foregoing sections. *Peck v. Greyhound Corp.*, 97 F.Supp. 679 (S.D.N.Y. 1951); *cf. Dyer v. SEC*, 291 F.2d 774, 778 (8th Cir. 1961). However, the Commission urges that the structure of section 14 of the Act gives rise to a doctrinal anomaly if administrative decisions like the present one are held reviewable. This difficulty arises from the fact that even when the Commission moves against recalcitrant management under section 14 of the Act to terminate or prevent violations of the proxy rules, there is never a traditional trial-type hearing followed by a conventional mandatory order. Professor Loss has catalogued the Commission's enforcement alternatives under section 14 as follows:

> [W]hen management or a security holder is adamant in refusing to comply with the rules as the Commission construes them, there is no administrative procedure comparable to the stop-order proceeding under the 1933 act. The Commission may investigate. It may use its statutory power to "publish information concerning * * * violations," as it did in two early instances. It may institute appropriate administrative proceedings of a disciplinary nature under the 1934 act when the offender happens to be a registered broker-dealer or an exchange member, as it may when some other statutory provision or Commission rule has been violated. It may even use a violation of section 14(a) as a basis for delisting the security. And it may ask the Attorney General to prosecute willful violations. But the principal sanction—and the only practicable way of forcing compliance—is the statutory action for injunction.

Loss, *The SEC Proxy Rules in the Courts*, 73 HARV.L.REV. 1041, 1043–44 (1960); *see also* Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties*, 31 N.Y.U. L.Rev. 875, 886, 886–87 n.50 (1956).

We see little force in this anomaly—if, indeed, it is in fact an anomaly. Through section 14 of the Act Congress has invested the Securities and Exchange Commission with sweeping authority to regulate the solicitation of corporate proxies; the few words employed by Congress in subsection (a) of this provision confer upon the Commission much power, but little guidance or limitation:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce * * * or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy * * * in respect of any security (other than an exempted security) registered pursuant to * * * this title.

(15 U.S.C. § 78n(a) (1964).) Pursuant to this broad mandate, the Commission has established elaborate procedures which are of unquestioned validity for present purposes and which, as we have indicated above, otherwise possess sufficient attributes of finality and formality to warrant judicial review. Viewing the proxy rules in this light, we see no substantial reason why the absence of formal adjudicatory hearings in the regulatory scheme should render Commission decisions, however capricious or erroneous, utterly immune to direct judicial review or redress. Indeed, it seems doubtful that there is any meaningful distinction between review in this situation and review in the commonly accepted context of judicial assessment of final agency determinations made well in advance of, or in collateral proceedings relating to, a statutorily prescribed trial-type hearing. *See, e.g. Phillips Petroleum Co. v. FPC*, *supra*, 227 F.2d at 475; *Isbrandtsen Co. v. United States*, *supra*, 93 U.S.App.D.C. at 297, 211 F.2d at 55.

On the other hand, we do see significant problems and anomalies which would result from accepting the Commission's

restrictive interpretation of the jurisdictional statute. There is no doubt that the Medical Committee could obtain a judicial determination of the legitimacy of its claim through a private action against Dow Chemical in the district court; the Supreme Court held that such a remedy is implicit in section 14(a) in *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). The essential question, then, is whether the district court is a more appropriate forum for adjudication of petitioner's claim than this court. We believe that every substantial consideration in this case leads to precisely the opposite conclusion.

Here the Medical Committee does not seek to contest any matters of fact which would require a trial de novo; rather, petitioner seeks only to have its proposal assessed by the Commission under a proper interpretation of the governing statutes and rules. The petitioner does not seek any relief which is peculiarly within the competence of the district court; instead, it seeks merely to have the cause remanded so that the Commission, in accord with proper standards, can make an enlightened determination of whether enforcement action would be appropriate. Thus we see no practical or theoretical virtues in commanding a course of action which "would result in equal inconvenience" to the petitioner, the Commission, and the overcrowded courts, and "would constitute circuitous routes for the determination of issues easily and directly determinable by review in this court." *American Sumatra Tobacco Corp. v. SEC*, 68 App. D.C. 77, 82, 93 F.2d 236, 241 (1937). *See also Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 191–93 (1967) (Justice Fortas concurring and dissenting); *Environmental Defense Fund, Inc. v. Hardin, supra*, (slip op. at 9); L.JAFFE 358.

There is also, it seems to us, an independent public interest in having the controversy decided in its present posture rather than in the context of a private action against the company. The primary and explicit purpose of section 14(a) is "the protection of investors," and the primary method of implementing this goal is through Commission regulation of proxy statements, not through private actions of individual security holders. For the small investor, personal recourse to the Commission's proxy procedures without benefit of counsel may well be the only practicable method of contesting a management decision to

exclude his proxy proposal.[12] In this situation, as our recent decisions make clear, it is particularly important that the Commission look carefully at the merits of the shareholder's proposal, and that it do so pursuant to an accurate perception of the Congressional intent underlying the proxy statute. *See generally Hale v. FCC*, No. 22,751 (D.C. Cir. Feb. 16, 1970) (slip op. at 15–17; concurring opinion); *Office of Communication of the United Church of Christ v. FCC*, No. 19,409 (D.C. Cir. June 20, 1969). Direct judicial review of Commission proxy decisions is unquestionably the most logical and efficient means of achieving this objective.

Thus, we hold that the Commission's decision in this case is presently reviewable, and turn our attention to an investigation of the proper scope of this review.

C. SCOPE OF REVIEW AND ADMINISTRATIVE DISCRETION

Many of the Commission's most forceful arguments are addressed to the proposition that the action which the Medical Committee now asks us to review falls within the purview of administrative discretion and therefore is protected from judicial inquiry or interference by section 10 of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (Supp. V. 1965–69). In large measure, this line of defense reflects the misconstruction of section 10 that Professor Davis has called an "all or none fallacy" which ignores the language and intent of this provision.[13] The more accurate interpretation of the statute holds

[12] This contention was recently presented to the Commmission in a proxy contest involving the General Motors Corporation. *See* CONG. REC. E–2147 (daily ed., March 17, 1970):

> It must be recognized that Management's proxy statement is the only effective vehicle through which all of the shareholders can have an opportunity to express themselves, and even to hear any arguments on the questions involved. * * * [T]he cost [of conducting a competing solicitation] is virtually prohibitive except to extremely well heeled shareholders * * *. This is no ordinary dispute with Management; it is not an effort by insurgent shareholders to seize control of the corporation. If it were so, one could justify large expenditures because the individual rewards are great and because, if successful, the insurgents could obtain reimbursement of their expenses from the company. The issues here lack that personal pecuniary bias. Denial of access to the shareholders through management's proxy solicitation, practically speaking, is total denial.

[13] 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 33 (1958). We note that Professor Davis espouses a more restrictive role for the courts in reviewing the discretionary acts of administrative agencies than that which is urged by other scholarly commentators. *See, e.g.*, Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969), and authorities cited *id.* at 966 n.9.

that assertions of discretion inevitably raise questions of degree which must be appraised in the context of the relevant provisions of law and the nature of the particular action sought to be reviewed: "[T]he question is not *whether* agency action is by law committed to agency discretion but *to what extent* agency action is so committed." 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 33 (1958) (emphasis added); *see also Scanwell Laboratories, Inc. v. Thomas*, No. 22,863 (D.C. Cir. Feb. 13, 1970) (slip op. at 28–29). Our decisions also make clear that in analyzing issues of administrative discretion, as in dealing with general questions of reviewability, we must be fully cognizant of the strong presumption in favor of judicial review. *Environmental Defense Fund, Inc. v. Hardin*, No. 23,813 (D.C. Cir. May 28, 1970) (slip op. at 7–8).

The Commission asserts that its enforcement activities pursuant to the proxy rules are entitled to particular deference because they partake of the nature of the prosecutorial function, which has traditionally been considered immune to judicial review.[14] This contention is meritorious, as will be seen below, but only in a limited sense; and the decisions of this court have never allowed the phrase "prosecutorial discretion" to be treated as a magical incantation which automatically provides a shield for arbitrariness. Indeed, we have explicitly alluded to the prosecutorial function in compelling an administrative agency to deal openly and fairly with public interest intervenors in licensing proceedings:

> [A] "Public Intervenor" * * * is, in this context, more nearly like a complaining witness who presents evidence to the police or a prosecutor whose duty it is to conduct

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[14] *But cf.* K. DAVIS, DISCRETIONARY JUSTICE 225–26, 229 (1969):

> In the regulatory agencies, abuse of the power to prosecute or not to prosecute may be ten times as frequent as abuse of the power of formal adjudication and therefore may be ten times as damaging to justice. * * *
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> The prosecuting power everywhere, whether exercised by police, by prosecutors, by regulatory agencies, or by other administrators, can and should be highly structured by both rules and precedents. * * *
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> The American assumption that prosecutors' discretion should not be judicially reviewable developed when executive functions were generally unreviewable. The assumption is in need of reexamination in light of the twentieth-century discovery that courts can review executive action to protect against abuses while at the same time avoiding judicial assumption of the executive power.

> an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.
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> * * * It was not the correct role of the Examiner or the Commission to sit back and simply provide a forum for the intervenors; the Commission's duties did not end by allowing Appellants to intervene; its duties began at that stage.

Office of Communication of the United Church of Christ v. FCC, No. 19,409 (D.C. Cir. June 20, 1969) (slip op. at 6).

There is some reason to believe that similar judicial supervision of the administrative process is needed in circumstances like the present one, in order to assure that the investing public can obtain vigorous, efficient, and evenhanded implementation of the concepts of corporate democracy embodied in the proxy rules. One published study has accused the Commission of a variety of procedural sins in its regulation of proxies, most of which could be curtailed or eliminated through judicial review. Specifically, the Commission has been charged with repeatedly violating its own established procedural principles, particularly those relating to management's burden of proof in justifying the omission of proposals; of allowing non-lawyers to decide complex legal problems raised in proxy disputes; and of affording inconsistent treatment to similar factual situations for no apparent reason.[15] Perhaps the most serious charge against the Commission's secretive decision-making, however, is all too clearly illustrated by the record in the present case: the lack of articulated bases for past decisions encourages management to file shotgun objections to a shareholder proposal, urging every mildly plausible legal argument that inventive counsel can contrive, in the hope that the Commission will accept one of them.[16] If the Commission does agree with one of management's arguments, or if it determines not to act against the company for other reasons, the shareholder often has no idea why his proposal was deemed unworthy or what he can do to cure its defects for subsequent proxy solicitations. Viewed in this light, "discretion" can be merely another manifestation of the venerable bureaucratic technique of exclusion

[15] Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 N.D. LAWYER 13 (1964).

[16] *See id.* at 43.

by attrition, of disposing of controversies through calculated non-decisions that will eventually cause eager supplicants to give up in frustration and stop "bothering" the agency.

Nevertheless, we recognize that there is a legitimate domain of administrative discretion in the proxy area, albeit not quite so broad as the Commission urges. As the Supreme Court has recognized, the Securities and Exchange Commission must process a formidable number of proxy statements in limited time and with insufficient manpower.[17] Obviously not all proxy proposals can or should be given detailed consideration by the full Commission, and even the boldest advocates of judicial review recognize that the agencies' internal management decisions and allocations of priorities are not a proper subject of inquiry by the courts.[18] However, that is definitely not what is at issue in the present case: here, the full Commission has exercised its discretion to review this controversy, and, as will be seen below, it has ostensibly acted in accord with a very dubious legal theory. The Medical Committee asks us merely to examine this allegedly erroneous legal premise and return the controversy to the Commission so that it may properly exercise its further discretion regarding the propriety and desirability of enforcement activity.[19]

Limited and partial review to examine the legal framework within which administrative discretion must be exercised is scarcely a doctrinal innovation; it has been repeatedly sus-

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[17] *Cf.* J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964):

> The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it.

[18] *Cf.* Environmental Defense Fund, Inc. v. Hardin, *supra*, slip. op. at 10; Goldman, *Administrative Delay and Judicial Relief*, 66 MICH.L.REV. 1423, 1426–31 (1968).

[19] Were we to compel the Commission either to entertain adminintrative review of a staff decision in the first instance, or to undertake particular enforcement activity upon remand, our decision might well conflict with the precedents which the Commission has cited involving petitioners' attempts to have courts order the Commission to initiate investigation pursuant to different sections of the Act. *See* Dyer v. SEC, 291 F.2d 774 (8th Cir. 1961); Leighton v. SEC, 95 U.S.App.D.C. 217, 221 F.2d 91, *cert. denied*, 350 U.S. 825 (1955) We note, however, that other circuits in dealing with action by other agencies have occasionally circumscribed administrative discretion to undertake investigatory activities. *See, e.g.*, Trailways of New England, Inc. v. CAB, 412 F.2d 926, 931–33 (1st Cir. 1969).

tained by the Supreme Court. *See, e.g., McGrath v. Kristensen*, 340 U.S. 162, 169 (1950); *Perkins v. Elg*, 307 U.S. 325, 349–50 (1939). We think that Justice Frankfurter's incisive observations in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 136 (1939), are equally appropriate here:

> Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles.

We foresee scant possibility that such sharply circumscribed review, which depends upon the Commission's initial determination to review the staff decision, will cause the destruction of informal advisory and supervisory functions which the Commission now fears. The courts, we think, are abundantly capable of distinguishing between situations in which an agency gives informal advice and situations in which it formally decides among conflicting adversary claims premised on detailed legal arguments. Moreover, experience indicates that the grim forebodings which are frequently expressed in this court regarding the possibility that a particular decision will cause irreparable disruption of the administrative process only rarely, if ever, come to pass.[20]

On the other hand, if we were to foreclose review as the Commission urges, we would surely be condoning a frustration of congressional intent; for here the petitioner asserts that the Commission is failing to correct abuses which Congress sought to end by enacting the statute, and that it is a member of the class which Congress endeavored to protect in the Securities Act. In such situations, as a leading commentator has phrased it, "[i]nterests intended as the beneficiaries of legislative munificence will have cold comfort from embracing

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[20] *Cf.* Goodman v. United States, No. 22,521 (D.C. Cir. Jan. 30, 1970) (slip op. at 9): "Words like 'chaos' and 'impossible situation' fall readily from bureaucratic lips when confronted with the prospect of doing something not absolutely required by the book." *See also* Scanwell Laboratories, Inc. v. Thomas, No. 22,863 (D.C. Cir. Feb. 13, 1970) (slip op. at 25–26).

the dry, unmoving skeleton of the statute." [21] Review limited to the task of correcting such legal defects is consistent with the Supreme Court's interpretation of the Securities Act in *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964): "[A]mong [the] chief purposes [of section 14(a)] is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." Therefore, we conclude that partial review of the merits of this controversy will not project us into an area which is committed by law to agency discretion.

III. The Merits of Petitioner's Proposal

The Medical Committee's sole substantive contention in this petition is that its proposed resolution could not, consistently with the Congressional intent underlying section 14(a), be properly deemed a proposal which is either motivated by *general* political and moral concerns, or related to the conduct of Dow's ordinary business operations. These criteria are two of the established exceptions to the general rule that management must include all properly submitted shareholder proposals in its proxy materials. They are contained in Rule 14a–8(c), 17 C.F.R. § 240.14a–8(c) (1970), which provides in relevant part:

> * * * [M]anagement may omit a proposal * * * from its proxy statement and form of proxy under any of the following circumstances:
>
> * * * * *
>
> (2) If it clearly appears that the proposal is submitted by the security holder * * * primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes; or
>
> * * * * *
>
> (5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer.

Despite the fact that our October 13 order in this case deferred resolution of the jurisdictional issue pending full argu-

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[21] Jaffe, *The Individual Right to Initiate Administrative Process*, 25 Iowa L. Rev. 485 (1940).

ment on the merits (*see* part I, *supra*), the Commission has not designed to address itself to any possible grounds for allowing management to exclude this proposal from its proxy statement. We confess to a similar puzzlement as to how the Commission reached the result which it did, and thus we are forced to remand the controversy for a more illuminating consideration and decision. *Cf. Environmental Defense Fund, Inc. v. Hardin*, *supra*. In aid of this consideration on remand, we feel constrained to explain our difficulties with the position taken by the company and endorsed by the Commission.

It is obvious to the point of banality to restate the proposition that Congress intended by its enactment of section 14 of the Securities Exchange Act of 1934 to give true vitality to the concept of corporate democracy. The depth of this commitment is reflected in the strong language employed in the legislative history:

> Even those who in former days managed great corporations were by reason of their personal contacts with their shareholders constantly aware of their responsibilities. But as management became divorced from ownership and came under the control of banking groups, men forgot that they were dealing with the savings of men and the making of profits became an impersonal thing. When men do not know the victims of their aggression they are not always conscious of their wrongs. * * *
>
> * * * * * *
>
> Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange. Managements of properties owned by the investing public should not be permitted to perpetuate themselves by the misuse of corporate proxies.

H.R. REP. No. 1383, 73d Cong., 2d Sess. 5, 13 (1934). *See also SEC v. Transamerica Corp.*, 163 F.2d 511, 517, 518 (3d Cir. 1947), cert. denied, 332 U.S. 847 (1948).

In striving to implement this open-ended mandate, the Commission has gradually evolved its present proxy rules. Early exercises of the rule-making power were directed primarily toward the achievement of full and fair corporate disclosure regarding management proxy materials (*see, e.g.*, 3 Fed. Reg. 1991 (1938); 5 Fed. Reg. 174 (1940)); the rationale underlying

this development was the Commission's belief that the corporate practice of circulating proxy materials which failed to make reference to the fact that a shareholder intended to present a proposal at the annual meeting rendered the solicitation inherently misleading. *See Hearings on Security and Exchange Commission Proxy Rules Before the House Comm. on Interstate and Foreign Commerce*, 78th Cong., 1st Sess., pt. 1, at 169–70 (1943) [hereinafter "House Hearings"]. From this position, it was only a short step to a formal rule requiring management to include in its proxy statement any shareholder proposal which was "a proper subject for action by the security holders." 7 Fed. Reg. 10,659 (1942). It eventually became clear that the question of what constituted a "proper subject" for shareholder action was to be resolved by recourse to the law of the state in which the company had been incorporated; however, the paucity of applicable state law giving content to the concept of "proper subject" led the Commission to seek guidance from precedent existing in jurisdictions which had a highly developed commercial and corporate law, and to develop its own "common law" relating to proper subjects for shareholder action. *See generally II L.Loss, Securities Regulation* 905–06 (1961); *Hearings on SEC Enforcement Problems Before a Subcom. of the Senate Comm. on Banking and Currency*, 85th Cong., 1st Sess., pt. 1, at 118 (1957) [hereinafter "Senate Hearings"].

Further areas of difficulty became apparent as experience was gained in administering the "proper subject" test, and these conflicts provided the Commission with opportunities to put a detailed gloss upon the general phraseology of its rules. Thus, in 1945 the Commission issued a release containing an opinion of the Director of the Division of Corporation Finance that was rendered in response to a management request to omit shareholder resolutions which bore little or no relationship to the company's affairs; for example, these shareholder resolutions included proposals "that the anti-trust laws and the enforcement thereof be revised," and "that all Federal legislation hereafter enacted providing for workers and farmers to be represented should be made to apply equally to investors." [22] The Commission's release endorsed the Director's conclusion that "proposals which deal with general political, social or economic matters are not, within the meaning of the rule, 'proper subjects

[22] Securities Exchange Act Release No. 3638 (Jan. 3, 1945), Brief for Petitioner at Addendum p. 2–3.

for action by security holders.' " [23] The reason for this conclusion was summarized as follows in the Director's opinion:

> Speaking generally, *it is the purpose of Rule X–14A–7 to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation;* that is, such matters relating to the affairs of the company concerned as are proper subjects for stockholders' action under the laws of the state under which it was organized. It was not the intent of Rule X–14A–7 to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature. *Other forums exist for the presentation of such views.*[24]

Several years after the Commission issued this release, it was confronted with the same kind of problem when the management of a national bus company sought to omit a shareholder proposal phrased as "A Recommendation that Management Consider the Advisability of Abolishing the Segregated Seating System in the South"—a proposal which, on its face, was ambiguous with respect to whether it was limited solely to company policy rather than attacking all segregated seating, and which quite likely would have brought the company into violation of state laws then assumed to be valid.[25] The Commission staff approved management's decision to omit the proposal, and the shareholder then sought a temporary injunction against the company's solicitation in a federal district court. The injunction was denied because the plaintiff had failed to exhaust his administrative remedies or to show that he would be irreparably harmed by refusal to grant the requested relief. *Peck v. Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951). The Commission amended its rules the following year to encompass the above-quoted exception for situations in which "it clearly appears that the proposal is submitted by the security holder * * * primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."

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[23] *Id.* at Addendum p. 2.

[24] *Id.* at Addendum p. 3 (emphasis added).

[25] *See* Emerson & Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U.CHI. L.REV. 807, 833 (1952); CONG. REC. E–2149 (daily ed. March 17, 1970).

17 Fed. Reg. 11,433 (1952); *see also id.* at 11,431. So far as we have been able to determine, the Commission's interpretation or application of this rule has not been considered by the courts.

The origins and genesis of the exception for proposals "relating to the conduct of the ordinary business operations of the issuer" are somewhat more obscure. This provision was introduced into the proxy rules in 1954, as part of amendments which were made to clarify the general proposition that the primary source of authority for determining whether a proposal is a proper subject for shareholder action is state law. *See* 19 Fed. Reg. 246 (1954). Shortly after the rule was adopted, the Commission explained its purpose to Congress in the following terms:

> The policy motivating the Commission in adopting the rule * * * is basically the same as the underlying policy of most State corporation laws to confine the solution of ordinary business problems to the board of directors and place such problems beyond the competence and direction of the shareholders. The basic reason for this policy is that it is manifestly impracticable in most cases for stockholders to decide management problems at corporate meetings.
>
> * * * * *
>
> * * * While rule X–14A–8 does not require that the ordinary business operations be determined on the basis of State law, the premise of Rule X–14A–8 is that the propriety of * * * proposals for inclusion in the proxy statement is to be determined in general by the law of the State of incorporation. * * * Consistency with this premise requires that the phrase "ordinary business operations" in rule X—14A–8 have the meaning attributed to it under applicable State law. To hold otherwise would be to introduce into the rule the possibility of endless and narrow interpretations based on no ascertainable standards.

(Senate Hearings at 118.) It also appears that no administrative interpretation of this exception has yet been scrutinized by the courts.

These two exceptions are, on their face, consistent with the legislative purpose underlying section 14; for it seems fair to

infer that Congress desired to make proxy solicitations a vehicle for *corporate* democracy rather than an all-purpose forum for malcontented shareholders to vent their spleen about irrelevant matters,[26] and also realized that management cannot exercise its specialized talents effectively if corporate investors assert the power to dictate the minutiae of daily business decisions. However, it is also apparent that the two exceptions which these rules carve out of the general requirement of inclusion can be construed so as to permit the exclusion of practically any shareholder proposal on the grounds that it is either "too general" or "too specific." Indeed, in the present case Dow Chemical Company attempted to impale the Medical Committee's proposal on both horns of this dilemma: in its memorandum of counsel, it argued that the Medical Committee's proposal was a matter of ordinary business operations properly within the sphere of management expertise and, at the same time, that the proposal clearly had been submitted primarily for the purpose of promoting general political or social causes. (App. 9a–10a; *see also id.* at 19a). As noted above, the Division of Corporation Finance made no attempt to choose between these potentially conflicting arguments, but rather merely accepted Dow Chemical's decision to omit the proposal "[f]or reasons stated in [the company's] letter and the accompany-

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[26] *See, e.g.*, the following colloquy, which appears in House Hearings at 162–63:

> Mr. BOREN. So one man, if he owned one share in A.T. & T. * * * and another share in R.C.A. * * * if he decided deliberately * * * to become a professional stockholder in each one of the companies—he could have a hundred-word propaganda statement prepared and he could put it in every one of these proxy statements. Suppose he were a Communist.
>
> Commissioner PURCELL. That is possible. We have never seen such a case.
>
> Mr. BOREN. Suppose a man were a Communist and he wanted to send to all of the stockholders of all these firms, a philosophic statement of 100 words in length, or a propaganda statement * * *. He could by the mere device of buying one share of stock * * * have available to him the mailing list of all the stockholders in the Radio Corporation of America.
>
> * * * * *
>
> Commissioner PURCELL. Of course, we have never seen such a case; and if such a case came before us, then we would have to deal with it and make such appropriate changes as might seem necessary * * *.

ing opinion of counsel, both dated January 17, 1969;"[27] this determination was then adopted by the full Commission. Close examination of the company's arguments only increases doubt as to the reasoning processes which led the Commission to this result.

In contending that the Medical Committee's proposal was properly excludable under Rule 14a-8(c)(5), Dow's counsel asserted:

> It is my opinion that *the determination of the products which the company shall manufacture*, the customers to which it shall sell the products, and the conditions under which it shall make such sales are related to the conduct of the ordinary business operations of the Company and that any attempt to amend the Certificate of Incorporation to define the circumstances under which the management of the Company shall make such determinations is contrary to the concept of corporate management, which is inherent in the Delaware General Corporation Act under which the Company is organized.[28]

In the first place, it seems extremely dubious that this superficial analysis complies with the Commission's longstanding requirements that management must sustain the burden of proof when asserting that a shareholder proposal may properly be omitted from the proxy statement, and that "[w]here man-

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[27] App. 20a. The letter referred to by the Division merely contains a citation to the proxy rules and a reference to the opinion of counsel (see App. 12a); thus, for present purposes the only relevant argument is that contained in the memorandum of counsel.

[28] App. 9a (emphasis added). The remainder of the company's argument under Rule 14a-8(c)(5) reads as follows, in its entirety:

> Moreover, there is considerable doubt as to the efficacy of the proposed limitation in the context of the ability of the Government of the United States to issue a directive that the Company manufacture napalm. Therefore, the proposed limitation could conceivably be contrary to the requirements of the Defense Production Act of 1950.

(App. 9a-10a.) In response to this contention, the Medical Committee pointed out that "any such amendment would, of course, be subject to the requirements of the 'Defense Production Act of 1950,' as are the corporate charters and management decisions of all United States Corporations." (App. 16a.) No rebuttal by Dow was forthcoming.

agement contends that a proposal may be omitted because it is not proper under State law, it will be incumbent upon management to refer to the applicable statute or case law." 19 Fed. Reg. 246 (1954). As noted above, the Commission has formally represented to Congress that Rule 14a-8(c)(5) is intended to make state law the governing authority in determining what matters are ordinary business operations immune from shareholder control; yet, the Delaware General Corporation law provides that a company's Certificate of Incorporation may be amended to "change, substitute, enlarge or diminish the nature of [the company's] business." [29] If there are valid reasons why the Medical Committee's proposal does not fit within the language and spirit of this provision, they certainly do not appear in the record.

The possibility that the Medical Committee's proposal could properly be omitted under Rule 14a–8(c)(2) appears somewhat more substantial in the circumstances of the instant case, although once again it may fairly be asked how Dow Chemical's arguments on this point could be deemed a rational basis for such a result: the paragraph in the company's memorandum of counsel purporting to deal with this issue, which is set forth in the margin,[30] consists entirely of a fundamentally irrelevant recitation of some of the political protests which had been directed at the company because of its manufacture of napalm, followed by the abrupt conclusion that management is therefore

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[29] Chapter 1, Title 8 Delaware Code §§ 242(a)(2), 242(d) (1968). *Cf.* II L.Loss, Securities Regulation 906 (1961): "Inevitably the Commission, while purporting to find and apply a generally nonexistent state law, has been building up a 'common law' of its own as to what constitutes a 'proper subject' for shareholder action. It is a 'common law' which undoubtedly would yield, as it should, to a contrary decision of the particular state court."

[30] App. 10a:

> It is a well-known fact that the Company has been the target of protests and demonstrations for the past few years at its office and plant locations, and on the occasion of recruiting on college and university campuses, as well as at its annual meeting of stockholders held May 8, 1968. The various protests and demonstrations are a reflection of opposition on the part of certain segments of the population against the policy of the United States Government in waging the war in Viet Nam. Although The Dow Chemical Company was not among the 100 largest prime contractors with the Department of Defense during the 1967–68 Government fiscal year and was only 75th on the list in the 1966–67 fiscal year, it appears to have been singled out symbolically by the protesters. Under all of these circumstances it is my opinion that it clearly appears that the proposal is primarily for the purpose of promoting a general political, social or similar cause.

entitled to exclude the Medical Committee's proposal from its proxy statement. Our own examination of the issue raises substantial questions as to whether an interpretation of Rule 14a–8 (c)(2) which permitted omission of this proposal as one motivated primarily by *general* political or social concerns would conflict with the congressional intent underlying section 14(a) of the Act.

As our earlier discussion indicates, the clear import of the language, legislative history, and record of administration of section 14(a) is that its overriding purpose is to assure to corporate shareholders the ability to exercise their right—some would say their duty[31]—to control the important decisions which affect them in their capacity as stockholders and owners of the corporation. Thus, the Third Circuit has cogently summarized the philosophy of section 14(a) in the statement that "[a] corporation is run for the benefit of its stockholders and not for that of its managers." *SEC v. Transamerica Corp.*, 163 F.2d 511, 517 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948). Here, in contrast to the situations detailed above which led to the promulgation of Rule 14a–8(c)(2), the proposal relates solely to a matter that is completely within the accepted sphere of corporate activity and control. No reason has been advanced in the present proceedings which leads to the conclusion that management may properly place obstacles in the path of shareholders who wish to present to their co-owners, in accord with applicable state law, the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy. Thus, even accepting Dow's characterization of the purpose and intent of the Medical Committee's proposal, there is a strong argument that permitting the company to exclude it would contravene the purpose of section 14(a).

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[31] *See* Bayne, *The Basic Rationale of Proper Subject*, 34 U.DET.L.J. 575, 579 (1957):

> In so far as the shareholder has contributed an asset of value to the corporate venture, in so far as he has handed over his goods and property and money for use and increase, he has not only the clear right, but more to the point, perhaps, he has the stringent duty to exercise control over that asset for which he must keep care, guard, guide, and in general be held seriously responsible.
>
> * * * As much as one may surrender the immediate disposition of [his] goods, he can never shirk a supervisory and secondary duty (not just a right) to make these goods are used justly, morally and beneficially.

However, the record in this case contains indications that we are confronted with quite a different situation. The management of Dow Chemical Company is repeatedly quoted in sources which include the company's own publications as proclaiming that the decision to continue manufacturing and marketing napalm was made not *because* of business considerations, but *in spite of* them; that management in essence decided to pursue a course of activity which generated little profit for the shareholders and actively impaired the company's public relations and recruitment activities because management considered this action morally and politically desirable. (App. 40a–43a; *see also id.* at 33.) The proper political and social role of modern corporations is, of course, a matter of philosophical argument extending far beyond the scope of our present concern; the substantive wisdom or propriety of particular corporate political decisions is also completely irrelevant to the resolution of the present controversy. What *is* of immediate concern, however, is the question of whether the corporate proxy rules can be employed as a shield to isolate such managerial decisions from shareholder control.[32] After all, it must be remembered that "[t]he control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a)." *SEC v. Transamerica Corp., supra,* 163 F.2d at 518. We think that there is a clear and compelling distinction between management's legitimate need for freedom to apply its expertise in matters of day-to-day business judgment, and management's patently illegitimate claim of power to treat modern corporations with their vast resources as personal satrapies implementing personal political or moral predilections. It could scarcely be argued that management is more qualified or more entitled to make these kinds of decisions than the shareholders who are the true beneficial owners of the corporation; and it seems equally implausible that an application of the proxy rules which permitted such a result could be harmonized with the philosophy of corporate democracy which Congress embodied in section 14(a) of the Securities Exchange Act of 1934.

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[32] *Cf.* Note, *Coporate Political Affairs Programs,* 70 YALE L.J. 821, 846–47 (1961).

In light of these considerations, therefore, the cause must be remanded to the Commission so that it may reconsider petitioner's claim within the proper limits of its discretionary authority as set forth above, and so that "the basis for [its] decision [may] appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review." [33]

Remanded for further proceedings consistent with this opinion.

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.
By: Dorothy E. Long, Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1969.

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT.

PETITION FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION.

Before: McGowan, Tamm and Robinson, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Securities & Exchange Commission and was argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that this case is hereby remanded to the

[33] Environmental Defense Fund, Inc. v. Hardin, No. 28,813 (D.C. Cir. May 28, 1970) (slip op. at 11).

Securities and Exchange Commission for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

NATHAN J. PAULSON,
Clerk.

Dated: July 8, 1970.
Opinion per Circuit Judge Tamm.

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: Dorothy E. Long, Deputy Clerk

United States Court of Appeals for the District of Columbia Circuit

Washington, D.C. 20001, August 25, 1970.

No. 23105—MEDICAL COMMITTEE FOR HUMAN RIGHTS, v. SECURITIES AND EXCHANGE COMMISSION

DAVID FERBER, ESQUIRE,
500 North Capitol Street, Washington, D.C. 20549

DEAR MR. FERBER: Enclosed is a copy of the Court's order denying your petition for rehearing. You are further informed that your suggestion for rehearing *en banc* was transmitted to the full Court, and no Judge has requested a vote thereon.

In view of the foregoing, it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

NATHAN J. PAULSON, *Clerk.*

NJP/erh
Enclosure
cc: Richard B. Herzog, Esquire.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1969

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

Before: McGOWAN, TAMM and ROBINSON, Circuit Judges, in Chambers

ORDER

On consideration of respondent's petition for rehearing,

Ordered by the Court that respondent's aforesaid petition is denied.

Per Curiam

For the Court:
NATHAN J. PAULSON,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1162

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS

Order Allowing Certiorari. Filed March 22, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

U.S. GOVERNMENT PRINTING OFFICE: 1971

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In the Supreme Court of the United States

OCTOBER TERM, 1970

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,
DANIEL M. FRIEDMAN,
Deputy Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted]

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 1a–44a) is reported at 432 F. 2d 659.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, p. 45a) was entered on July 8, 1970, and a timely petition for rehearing and suggestion of rehearing *en banc* was denied on August 26, 1970 (Appendix C, *infra*, p. 46a). On November 16, 1970, the Chief Justice extended the time for filing a petition

for a writ of certiorari to and including December 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a determination by the Securities and Exchange Commission "to raise no objection" if a company omits a shareholder proposal from its proxy solicitation material is a Commission "order" directly reviewable in the court of appeals.

STATUTES AND RULES INVOLVED

The relevant provisions of Section 14(a), 21(e) and 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a), 78u(e) and 78y(a), and Rule 14a–8 of the Securities and Exchange Commission, 17 C.F.R. 240.14a–8, are set forth in Appendix D, *infra*, pp. 47a–52a.

STATEMENT

Section 14(a) of the Securities Exchange Act of 1934 (Appendix D, *infra*, p. 47a) makes unlawful any proxy solicitation which is "in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." To implement this provision, the Commission has promulgated Regulation 14A (17 C.F.R. 240.14a–1 *et seq.*). Rule 14a–8, 17 C.F.R. 240.14a–8 (Appendix D, *infra*, pp. 49a–52a), governs proposals by shareholders; in general, it requires the company to include shareholder proposals in its proxy solicitation materials. Subsection (c) thereof permits the company to omit certain shareholder proposals, including those

submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes". (Rule 14a–8(c)(2)) and those involving "a matter relating to the conduct of the ordinary business operations of the issuer" (Rule 14a–8(c)(5)). If the company "asserts that a proposal * * * may properly be omitted," it must so notify the shareholder and file with the Commission the proposal and a statement of reasons for its conclusion.

Early in 1969, the Medical Committee for Human Rights ("the Committee"), a shareholder in Dow Chemical Company ("Dow"), requested Dow to submit to its shareholders in its proxy solicitation material for the 1969 annual meeting a resolution requesting that the company's charter be amended to prohibit the company from manufacturing napalm.[1] Dow decided to omit the proposal, giving the Committee two reasons for its decision—(1) the Committee's primary purpose in submitting the proposal was to promote a general political, social, or similar cause, and (2) the proposal related to the conduct of ordinary business operations. The Committee protested Dow's decision to the company and the Commission, and requested review of Dow's decision by the Commission staff and oral argument before the Commission if the staff should agree with Dow. Dow then filed with the Commission the Committee's proposal and the company's reasons for deciding to omit

[1] A similar request had been made in 1968, but was received by Dow too late for inclusion in the 1968 proxy statement (Appendix A, *infra*, pp. 2a–4a).

it from the proxy solicitation materials. (Appendix A, *infra,* pp. 4a–5a).

On February 18, the Commission's Division of Corporation Finance advised Dow and the Committee that "[f]or reasons stated in [Dow's] letter and the accompanying opinion of counsel, * * * this Division will not recommend any action * * * if this proposal is omitted from the management's proxy material * * *." The Committee then sent the Commission a letter requesting Commission review of the Division's action and containing its arguments in support of its proposal (Appendix A, *infra,* pp. 5a–6a).

On March 24, the Commission determined (Appendix E, *infra,* p. 53a) "to raise no objection to the omission from the management's proxy statement" of the proposal. In accordance with its customary practice, the Commission's action was reflected solely in a minute of its meeting. The Committee was advised of the decision the same day by telephone and on April 2 in writing. (Appendix A, *infra,* pp. 6a–7a.)

On May 29, 1969, the Committee filed in the Court of Appeals for the District of Columbia Circuit a petition to review the Commission's action of March 24. The Commission moved to dismiss on the ground that its determination not to take enforcement action was not a reviewable order.

The court of appeals first held that the Commission's decision was reviewable.[2] It stated that "the

[2] The court also held that the petition to review was timely filed. The petition was filed 66 days after the Commission made its decision on March 24, 1969. Section 25(a) of the Act re-

Commission's proxy procedures are possessed of sufficient 'adversariness' and 'formality' to render its final proxy determinations amenable to judicial review" (Appendix A, *infra,* p. 21a); and that "[d]irect judicial review of Commission proxy decisions is unquestionably the most logical and efficient means of achieving [the Congressional] objective" in Section 14(a) of the Act of protecting investors (*id.,* p. 25a).

As to the scope of review, the court recognized that "there is a legitimate domain of administrative discretion in the proxy area, albeit not quite so broad as the Commission urges" (Appendix A, *infra,* p. 29a), but concluded that it properly could review the Commission's action to determine whether the agency acted upon an "erroneous legal premise" (*ibid.*). The court then discussed extensively the standards governing exclusion of stockholder proposals and the reason Dow gave for excluding the Committee's proposal (*id.,* pp. 32a–44a), concluding (*id.,* p. 44a):

> In light of these considerations, therefore, the cause must be remanded to the Commission so that it may reconsider petitioner's claim within the proper limits of its discretionary authority as set forth above, and so that "the basis for [its] decision [may] appear clearly

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quires that review be sought within 60 days after entry of the order to be reviewed. The court held, however, that the order could not be viewed as having been "entered" until the person aggrieved thereby had adequate information thereof, and that the telephonic notice of March 24, 1969, was not sufficient to start the running of the 60-day period (Appendix A, *infra,* pp. 6a–9a). We are not here challenging that ruling.

on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review" [square brackets in original; footnote omitted].

REASONS FOR GRANTING THE WRIT

1. This case presents an important question in the administration of the proxy rules of the Securities and Exchange Commission. At present, Commission review of corporate proxy solicitation materials and of company decisions to exclude shareholder proposals from such materials is conducted speedily (as it must be), informally and flexibly. Prior to the decision below, it had been generally recognized that a Commission determination not to take action with respect to a particular proxy solicitation could not be judicially reviewed.[3] Indeed, almost 20 years ago the Court of Appeals for the Second Circuit without discussion dismissed a shareholder's petition seeking review of the same type of Commission action involved in this case: the Commission's determination to raise no objection to a company's omission from its proxy solicitation material of a shareholder's proposal. *Peck* v. *Securities and Exchange Commission,* C.A. 2, No. 22289, April 7, 1952.[4]

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[3] See Aranow & Einhorn, *Proxy Contests for Corporate Control* 297 (2d ed. 1968); Clusserath, *The Amended Stockholder Proposal Rule; A Decade Later*, 40 Notre Dame Law. 13, 17 (1964); 1 Davis, *Administrative Law Treatise* Section 4.09 (1958); III Loss, *Securities Regulation* 1926 (1961).

[4] The case is discussed in the Commission's Eighteenth Annual Report 75–76 (1952). In 1960 the Second Circuit again dismissed a petition to review by a security holder which challenged the Commission's refusal to disapprove a company's

Under the heretofore prevailing view, the only remedy available to a shareholder dissatisfied with the Commission's unwillingness to take enforcement action was to initiate his own action in the district court to enjoin the company from violating the proxy rules—a remedy this Court has twice emphasized to be a "necessary supplement" to Commission enforcement efforts in aid of the Congressional purpose. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 382. By the same reasoning, if a company disagrees with the Commission and therefore refuses to make changes the Commission believes necessary to correct violations of the proxy rules, the only available means by which the Commission can prevent such violations is to institute an injunction action against the company in the district court. The Commission has no authority under Section 14(a) of the Securities Exchange Act to require a company to make changes in its proxy solicitation material; only a district court may do so.

The decision in this case in effect overturns more than 30 years of settled administrative practice, and will require formalization of the Commission's proxy review procedures or, alternatively, a significant curtailment of the informal procedure previously employed, either of which will impede rather than further the basic purpose of the rules of aiding cor-

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proxy statement and to initiate enforcement proceedings against the company for alleged violations of the proxy rules. *Leighton* v. *Securities and Exchange Commission*, C.A. 2, No. 26458, November 3, 1960.

porate democracy.[5] It is also certain to cause additional and, we believe, unnecessary litigation. In the circumstances, review by this Court is clearly appropriate.

2. Section 25(a) of the Act (Appendix D, *infra*, pp. 48a–49a) limits court-of-appeals review to "an order issued by the Commission in a proceeding under [the Act] to which such [aggrieved] person is a party." Examination of the Commission's procedures in reviewing proxy solicitation material demonstrates that the Commission's action here in deciding "to raise no objecton" to Dow's omission of the Committee's proposal from its proxy solicitation material was not an "order" reviewable under Section 25(a).

The Commission's Regulation 14A specifies in considerable detail the content and form of proxy solicitation material and requires that copies of proposed material be filed with the Commission in advance, thereby enabling the Commission to examine and comment upon it. While the rules prescribe no formal procedure, the examination ordinarily is made by the staff, with Commission participation only in those

[5] That purpose was succinctly summarized in *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431: "The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that '[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.' H.R. Rep. No. 1383, 73rd Cong., 2d Sess., 13." Accord, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381; *Securities and Exchange Commission* v. *Transamerica Corp.*, 163 F. 2d 511, 518 (C.A. 3), certiorari denied, 332 U.S. 847.

cases where unusual problems exist or where an interested person requests it. The rules, after providing that proposed material must be filed with the Commission at least 10 days before distribution to the shareholders, admonish that final printing of the materials should be deferred "until the comments of the Commission's staff have been received and considered" (Rule 14a–6(a), (f) and (note)). With respect to any questions or suggestions the staff may have, the emphasis is on negotiation and discussion, the basic purpose being to resolve any disagreements between the Commission staff and the company on a mutually satisfactory basis, and thus avoid litigation.[6]

[6] The Commission's explanation of its informal procedures is contained in 17 C.F.R. 202.1(d):

> The informal procedures of the Commission are largely concerned with the rendering of advice and assistance by the Commission's staff to members of the public dealing with the Commission. While opinions expressed by members of the staff do not constitute an official expression of the Commission's views, they represent the views of persons who are continuously working with the provisions of the statute involved. And any statement by the director, associate director, assistant director, chief accountant, chief counsel, or chief financial analyst of a division can be relied upon as representing the views of that division. In certain instances an informal statement of the views of the Commission may be obtained. The staff, upon request or on its own motion, will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.

See, also, 17 C.F.R. 202.2.

Where a shareholder proposal is involved, the shareholder, as here, will often advise the staff of his views, although he is not required to do so. If either the company or the shareholder is dissatisfied with the staff's opinion, it may request the Commission itself to consider the matter. But such Commission consideration, whatever the result, cannot change the informal character of what the agency is doing, initially through the staff and then by the Commission itself.

Neither the staff nor the Commission is making any definitive determination that commands or requires any action by the company or forecloses any right of the shareholder. At most, the agency may informally indicate whether proposed proxy solicitation material appears to comply with the rules, and, if it appears not to comply, in what respects it should be changed. The company may accept or reject the Commission's views. If it accepts them, presumably it has been influenced by the knowledge that it is thereby avoiding the possibility of litigation; if it rejects them, it knows that litigation may follow, since the only means by which the Commission can compel compliance with the proxy rule is a judicial enforcement action.[7]

[7] See generally II Loss, *Securities Regulation* 931 (1961). There is no provision in Section 14(a) for formal orders by the Commission in an administrative proceeding relating to proposed proxy materials. Compare Section 12(e) of the Public Utility Act of 1935, 15 U.S.C. 79*l*(e), which makes unlawful the solicitation of "any proxy * * * regarding any security of a reg-

The basic error of the court of appeals was its presumption that in deciding "to raise no objection" if the company omitted the Committee's proposal from its proxy solicitation materials, the Commission decided the merits of the controversy between the company and the Committee. The Commission did no more than indicate it would not take enforcement action if Dow declined to include the proposal. That decision could have been made for various reasons, which might or might not have involved a consideration by the Commission members of the merits.[8]

But whatever may have been the views of its individual members, the Commission expressed no opinion on the staff's conclusion that under the rules the company was not required to include the proposal, and thus made no definitive determination on this matter. The Committee could have brought an action in the

istered holding company or a subsidiary company thereof in contravention of such rules and regulations *or orders* as the Commission deems necessary or appropriate * * * for the protection of investors or consumers or to prevent the circumvention of the provisions of [that Act] or the rules, regulations, *or orders* thereunder" (emphasis supplied). Rule 62 under that Act, 17 C.F.R. 250.62, implements this provision by establishing formal administrative procedures with respect to consideration of certain types of soliciting material, which lead to a formal Commission order.

[8] The Commission might have concluded that the rules did not require the Company to include the Committee's proposal in its material, or that, for whatever reason, it was not appropriate to litigate the issue in this case. See VI Loss, *Securities Regulation* 4023 (Supp. 1969). Since the Commission gave no explanation for its action, it is impossible to ascertain the ground of its decision to take no action against the company.

district court to compel Dow to include the proposal without ever having complained to the Commission.[9] Similarly, if the Committee had filed suit in the district court following the Commission's action, the latter would have been legally irrelevant.[10]

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[9] In neither *Borak*, *supra*, nor *Mills*, *supra*, did this Court, in holding that a private cause of action exists for violation of the proxy rules, suggest that any application to the Commission to take action was a prerequisite thereto. In support of the contrary proposition the court below relied (Appendix A, *infra*, p. 21a) solely upon *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y.), which does not hold that the exhaustion doctrine is applicable and, in any event, seems to reflect a "misunderstanding of the Commission's informal review procedure * * *," Aranow & Einhorn, *Proxy Contests for Corporate Control* 165 n. 9 (2d ed. 1968).

[10] The court of appeals suggested (Appendix A, *infra*, p. 14a) that appellate review was necessary to protect the Committee from "the added burden in a private action of overcoming an adverse Commission determination," citing *Union Pac. R. Co.* v. *Chicago & N.W. Ry. Co.*, 226 F. Supp. 408, 408 (N.D. Ill.). Whatever weight might have appropriately been given to the Commission's determinations in other contexts, Rule 14a-9(b), 17 C.F.R. 240.14a-9(b), expressly disavows any such effect in the proxy material area: "The fact that * * * proxy * * * soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders * * *." Indeed, in both *Borak* and *Mills* it appears that the Commission had raised no objection to the proxies there attacked. See also *Klastorin* v. *Roth*, 353 F. 2d 182 n. 2 (C.A. 2); *Securities and Exchange Commission* v. *Henwood*, [1961-1964 Transfer Binder] CCH Fed. Sec. L. Rep. ¶91,125 (S.D. Cal.), modified and affirmed *per curiam*, 298 F. 2d 641 (C.A. 9), certiorari denied, 371 U.S. 214; VI Loss, *Securities Regulation* 4023-4024 (Supp. 1969).

In thus deciding not to take enforcement action against Dow, the Commission, under long-settled criteria governing judicial review, issued no judicially reviewable order. Cf. *United States* v. *Los Angeles R.R.*, 273 U.S. 299; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375; *Toilet Goods Ass'n, Inc.* v. *Gardner*, 387 U.S. 158; *City of Chicago* v. *United States*, 396 U.S. 162.[11]

The nonreviewable character of the Commission's action in this case is not changed even if, contrary to our submission, it is deemed to reflect a ruling on the merits, *i.e.*, the conclusion that under the proxy rules the company was not required to include the Committee's proposal—as the court of appeals apparently viewed the Commission's action (Appendix A, *infra*, p. 39a). Section 21(e) of the Act (Appendix D, *infra*, pp. 47a–48a) states that the Commission "may in its discretion" bring a district court action directed against violations of the statute or its rules. The settled principle that courts will not review an agency's discretionary determination not to institute enforcement proceedings (see n. 11, *supra*) covers not

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But see *Curtin v. American Tel. & Tel. Co.*, 124 F. Supp. 197 (S.D.N.Y.); *Mack* v. *Mishkin*, 172 F. Supp. 885, 886 (S.D.N.Y.); *Brooks* v. *Standard Oil Co. of N.J.*, 308 F. Supp. 810 (S.D.N.Y.); and *Riskin* v. *National Computer Analysts, Inc.*, 308 N.Y.S. 2d 985 (N.Y. Sup. Ct.). In each of the latter four cases the court gave weight to the Commission's views. But, for the reasons stated above, the courts were not legally obliged to do so, and to the extent these cases suggest otherwise, they were incorrectly decided.

[11] In other contexts the courts have recognized that the Commission's decision not to take enforcement action does not give

only the wisdom and bases for that decision, but also the correctness of any legal views it may involve. Cf. *Schilling* v. *Rogers*, 363 U.S. 666, 670, 674–676. The court of appeals concluded (Appendix A, *infra*, p. 30a) that cases such as *McGrath* v. *Kristensen*, 340 U.S. 162, and *Perkins* v. *Elg*, 307 U.S. 325, permit review of such legal issues. Those cases are distinguishable, however, since there the courts reviewed agency legal rulings that were preliminary to the exercise of administrative discretion, whereas in the present case the alleged erroneous rulings were an integral part of the discretionary decision itself.

3. The practical effect of the decision below will be to impede rather than to further the court's announced objective of providing "an authoritative judicial determination of the merits of [a shareholder's] proposal" so as to effectuate the "primary and explicit purpose of section 14(a)" of the protection of investors (Appendix A, *infra*, pp. 14a, 24a).

The court below required that the basis of the Commission's decision "appear clearly on the record * * * in sufficient detail to permit prompt and effective

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rise to a judicially reviewable order. See, *e.g.*, *Dyer* v. *Securities and Exchange Commission*, 291 F. 2d 774 (C.A. 8) (Commission refusal to initiate investigation under the Public Utility Holding Company Act of 1935); *Leighton* v. *Securities and Exchange Commission*, 221 F. 2d 91 (C.A. D.C.), certiorari denied, 350 U.S. 825 (Commission refusal to initiate investigation and regulation under Securities Act of 1933); *Crooker* v. *Securities and Exchange Commission*, 161 F. 2d 944 (C.A. 1) (informal Commission consent to filing of amendments to a registration statement under the Securities Act of 1933). See also III Loss, Securities Regulation 1926 (1961).

review" (Appendix A, *infra,* p. 44a). If the Commission must satisfy this standard, its procedures for reviewing proxy materials necessarily will become less flexible and more time-consuming than those heretofore utilized. "Close judicial scrutiny inevitably leads to more formalized decision-making." *Hahn* v. *Gottlieb,* 430 F. 2d 1243, 1250 (C.A. 1). The effect will be to diminish the utility of informal review as an aid to enforcement.[12]

As the court below noted (Appendix A, *infra,* p. 14a), time is of the essence in this field; Commission rulings must be made within a brief period after the material has been filed with the agency. Such expedited handling of the large number of proxy materials submitted annually to the Commission—in the 1969 fiscal year the agency reviewed more than 5,300 proxy statements, most of which were handled in the two or three months in the spring when corporate meetings generally are held—would be virtually impossible

[12] The Commission's informal procedures have been commended as an "excellent practice in administrative procedure." Commission on Organization of the Executive Branch of the Government, *Task Force Report on Legal Services and Procedures* 189 (1955). See also *Administrative Procedure in Government Agencies,* Report of the Committee on Administrative Procedure, Appointed by the Attorney General, at the Request of the President, To Investigate the Need for Procedural Reform in Various Administrative Tribunals and To Suggest Improvements Therein, S. Doc. No. 8, 77th Cong., 1st Sess., pp. 39–40 (1941); Aranow & Einhorn, *Proxy Contests for Corporate Control* 294–297 (2d ed. 1968); III Loss, *Securities Regulation* 1894–1896 (1961), VI Loss, *id.* 4023–4026 (Supp. 1969); 1 Davis, *Administrative Law Treatise* Section 4.09 (1958).

under the more formal procedures the decision below will produce. Indeed, since an important element of the decision below apparently was the court's view that the Commission's existing procedures "incorporate the basic theory of an adversary encounter" between the company and its security holders (Appendix A, *infra,* pp. 19a–21a), the agency might find it necessary, in order to reduce its administrative burdens and to permit the necessary expeditious review of proxy materials, to eliminate security holder participation in that review.

The decision also will cause additional unnecessary appellate litigation. The court held only that the Commission had failed to give an adequate explanation of its reasoning, and remanded the case for the agency to reconsider the Committee's proposal "within the proper limits of discretionary authority" and to state "the basis for [its] decision" (Appendix A, *infra,* p. 44a). The court of appeals has not decided whether or not the company properly may exclude the Committee's proposal; it has left that for the Commission to decide. Moreover, the court recognized that its authority to compel the Commission to institute an enforcement action was doubtful (Appendix A, *infra,* pp. 29a–30a, n. 19). If upon remand, the Commission were to state that the company is required to include the Committee's proposal, the company could be compelled to do so only if the Committee or the Commission instituted and prevailed in an enforcement action in the district court. As noted, *supra,* p. 12, the Commission views would have no legal effect in such an action.

Finally, the reasoning of the court of appeals suggests that, if the Commission on the remand ruled against the company, the latter could then directly challenge that determination by filing its own petition to review in an appropriate court of appeals. The end result of the decision below is thus likely to be more rather than less litigation, resulting in delay, additional burdens on the courts, and additional expense to security holders with no concomitant benefit to the latter.

The additional burdens and delays that would result from the decision below are compounded by the fact that the court of appeals can do no more than expose alleged legal errors of the Commission in interpreting and applying the proxy rules; the nature of the review that the court of appeals has specified precludes it from providing any affirmative relief to the shareholders. In contrast, as this Court recognized in *Borak, supra,* a district court in a suit brought by a security holder to cure violations of the proxy rules may, upon finding a violation, fashion "such remedies as are necessary to make effective the congressional purpose [of Section 14(a)]" (377 U.S. at 432–433). Thus, the previously accepted method for enforcing the proxy rules—an enforcement action brought in the district court by either a stockholder or the Commission—permits whatever relief is necessary to cure any violations found, whereas the court of appeals' review sanctioned in the present case determines nothing at all with finality and is but the harbinger of further proceedings to come.

In these circumstances, there is no sound policy reason to add direct court of appeals review to the existing and effective system by which compliance with the proxy rules is secured primarily through informal Commission review and, in a relatively few instances, through a district court suit brought by security holders or the Commission.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1970.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

Petition for Review of an Order of the Securities and Exchange Commission

Decided July 8, 1970

Before McGOWAN, TAMM, and ROBINSON, *Circuit Judges.*

TAMM, *Circuit Judge:* The instant petition presents novel and significant questions concerning implementation of the concepts of corporate democracy embodied in section 14 of the Securities Exchange Act of 1934, and of the power of this court to review determinations of the Securities and Exchange Commission made pursuant to its proxy rules. For reasons to be stated more fully below, we hold that the Commission's action in the present case is reviewable, and that the cause must be remanded for further administrative proceedings.

I. PROCEDURAL HISTORY OF THE CASE

On March 11, 1968, Dr. Quentin D. Young, National Chairman of the Medical Committee for Human

Rights, wrote to the Secretary of the Dow Chemical Company, stating that the Medical Committee had obtained by gift several shares of Dow stock and expressing concern regarding the company's manufacture of the chemical substance napalm.[1] In part, Dr. Young's letter said:

> After consultation with the executive body of the Medical Committee, I have been instructed to request an amendment to the charter of our company, Dow Chemical. We have learned that we are technically late in asking for an amendment at this date, but we wish to observe that it is a matter of such great urgency that we think it is imperative not to delay until the shareholders' meeting next year. * * *
>
> * * * * *
>
> We respectfully propose the following wording to be sent to the shareholders:
>
> "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment

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[1] Napalm is described as follows in 15 "ENCYCLOPAEDIA BRITANNICA" 1170 (1968):

"[T]he aluminum soap of naphthenic and palmitic acids which, when mixed with gasoline, forms a sticky sirup used in chemical warfare.

"In World War I both Germany and the Allies used raw gasoline in flame throwers * * * but it burned too quickly to be fully effective. What was needed was a thickener that would slow down the rate of burning and increase the range of the weapon. Napalm did this, and it also greatly raised the temperature at which the fuel burned. Harvard university scientists, in cooperation with the U.S. army chemical warfare service, developed the substance in 1942."

> to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

(App. 1a–2a.) The letter concluded with the following statement:

> Finally, we wish to note that our objections to the sale of this product [are] primarily based on the concerns for human life inherent in our organization's credo. However, we are further informed by our investment advisers that this product is also bad for our company's business as it is being used in the Vietnamese War. It is now clear from company statements and press reports that it is increasingly hard to recruit the highly intelligent, well-motivated, young college men so important for company growth. There is, as well, an adverse impact on our global business, which our advisers indicate, suffers as a result of the public reaction to this product.

(App. 2a.) Copies of this letter were forwarded to the President and the General Counsel of Dow Chemical Company, and to the Securities and Exchange Commission. (App. 3a.)

By letter dated March 21, 1968, the General Counsel of Dow Chemical replied to the Medical Committee's letter, stating that the proposal had arrived too late for inclusion in the 1968 proxy statement, but promising that the company would "study the matter and * * * communicate with you later this year" regarding inclusion of the resolution in proxy materials circulated by management in 1969. (App. 4a.) Copies of this letter, and of all subsequent correspondence, were duly filed with the Commission.

The next significant item of record is a letter dated January 6, 1969, noting that the Medical Committee was "distressed that 1968 has passed without our having received a single word from you on this important matter," and again requesting that the resolution be included in management's 1969 proxy materials. (App. 7a–8a.) The Secretary of Dow Chemical replied to this letter on January 17, informing the Medical Committee that Dow intended to omit the resolution from its proxy statement and enclosing an opinion memorandum from Dow's General Counsel, the contents of which will be discussed in detail in part III, *infra*. (App. 9a–12a.) On February 3 the Medical Committee responded to Dow's General Counsel, asserting that he had misconstrued the nature of their proposal in his opinion memorandum, and averring that the Medical Committee would not "presume to serve as draftsmen for an amendment to the corporate charter." (App. 15a.) The letter continued:

> We are willing to bend * * * to your belief that the management should be allowed to decide to whom and under what circumstances it will sell its products. Nevertheless, we are certain that you would agree that the company's owners have not only the legal power but also the historic and economic obligation to determine what products their company will manufacture. Therefore, [we submit] * * * our revised proposal * * * requesting the Directors to consider the advisability of adopting an amendment to the corporate charter, forbidding the company to make napalm (any such amendment would, of course, be subject to the requirements of the "Defense Production Act of 1950," as are the corporate charters and management decisions of all United States Corpora-

tions), [and] we request that the following resolution be included in this year's proxy statement:

"RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws [sic] of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm."

(App. 16a.) On the same date, a letter was sent to the Securities and Exchange Commission, requesting a staff review of Dow's decision if it still intended to omit the proposal, and requesting oral argument before the Commission if the staff agreed with Dow. (App. 17a.)

On February 7, 1969, Dow transmitted to the Medical Committee and to the Commission a letter and memorandum opinion of counsel, which in essence reiterated the previous arguments against inclusion of the proposal and stated the company's intention to omit it from the proxy statement. (App. 18a–19a.) Shortly thereafter, on February 18, 1969, the Commission's Chief Counsel of the Division of Corporation Finance sent a letter to Dow, with copies to the Medical Committee, concluding that "[f]or reasons stated in your letter and the accompanying opinion of counsel, both dated January 17, 1969, this Division will not recommend any action * * * if this proposal is omitted from the management's proxy material * * *." (App. 20a.) In a letter dated February 28—which contains the first indications of record that petitioners had retained counsel—the Medical Committee again renewed its request for a Commis-

sion review of the Division's decision. (App. 24a.) On the same day, the Medical Committee filed with the Commission a memorandum of legal arguments in support of its resolution, urging numerous errors of law in the Division's decision. (App. 26a–32a.) Several other documents were filed by both the company and the Medical Committee; finally, on April 2, 1969, both parties were informed that "[t]he Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised if the Company omits the proposals from its proxy statements for the forthcoming meeting of shareholders." (App. 44a–45a.) The petitioners thereupon instituted the present action, and on July 10, 1969, the Commission moved to dismiss the petition for lack of jurisdiction. On October 13 we denied the motion "without prejudice to renewal thereof in the briefs and at the argument on the merits."

In its briefs and oral argument, the Commission has consistently and vigorously urged, to the exclusion of all other contentions, that this court is without jurisdiction to review its action. We find this argument unpersuasive.

II. Jurisdiction To Review

A. TIMELINESS

The Commission's first argument on the jurisdictional point is that the instant petition was untimely filed, thereby depriving this court of power to adjudicate the controversy. This argument is based upon the provision of section 25(a) of the Securities Act, 15 U.S.C. § 78y(a) (1964), which requires that a petition for review must be filed "within sixty days after the entry" of a Commission order.

In the instant case the Commission's minutes reflect that the decision which was reached after reviewing

the petitioner's proxy claim was made on March 24, 1969 (App. 46a), whereas the petition to review in this court was not filed until May 29, 1969—some 66 days thereafter. It also appears uncontroverted that the Commission gave the Medical Committee some notification by telephone on March 24 that a decision had been reached, although the substance of this conversation is not reproduced in the briefs or record. (*Cf.* Supp. App. 3.) However, as we noted in the preceding section, petitioners did not receive any written information concerning the Commission's decision until a letter was mailed to them on April 2; in addition, the Medical Committee has asserted, without contradiction, that the Commission temporized for approximately four weeks after the petitioner requested a formal copy of the minutes of the decision, before making this important information available. (Reply Brief for Petitioner at 14 n. 2 and accompanying text.)

It must be noted that the Commission is itself rather untimely in making this assertion of untimeliness, for in its July 10 Motion to Dismiss it explicitly disclaimed any intention to press upon us an argument relating to the time of filing the instant petition.[2] This resolve apparently fell by the wayside, however, and the timeliness argument appeared in full dress in the Commission's responsive brief on the merits, thereby helping to trigger further rounds of briefing by both

[2] Memorandum in Support of Respondent's Motion to Dismiss Petition for Review at 5 n. 2:

"This court may, alternatively, be without jurisdiction based upon the Medical Committee's failure to file its May 29 petition to review 'within sixty days after the entry of' the alleged order * * *. *We do not urge the point, however, since the Commission's staff did not advise the Medical Committee of the Commission's March 24 decision * * * until April 2 * * *.*" [Italic added.]

sides. We need not elevate the Commission's vacillation to the status of a waiver, however, because we have concluded that its timeliness argument must fail on the merits.

The Commission relies primarily upon section 22(k) of its Rules of Practice, 17 C.F.R. § 201.22(k) (1970), which provides:

> In computing any period of time involving the date of the entry of an order by the Commission, the date of entry shall be (1) the date of the adoption of the order by the Commission * * * or (2) in the case of orders reflecting action taken pursuant to delegated authority, the date when such action is taken * * *. (3) *The order shall be available for inspection by the public from and after the date of entry, unless it is a non-public order. A non-public order shall be available for inspection from and after the date of entry by any person entitled to inspect it.* [Italics added.]

In essence, the Commission has taken the position that the date of decision, March 24, must be deemed the date of "entry" within the meaning of Rule 22(k), notwithstanding the language of the rule italicized above, and notwithstanding the fact that no written information regarding the basis of the decision was available until a substantial time after March 24.

None of the cases cited by the parties offers much guidance in resolving the particular timeliness question now before us;[3] however, we think it clear that Rule 22(k), together with the 60-day statutory period

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[3] *Lile* v. *SEC*, 324 F. 2d 772 (9th Cir. 1963), which seems most directly apposite to the facts of the instant case, was decided prior to the adoption of the present version of Rule 22(k). *See* 29 Fed. Reg. 3424 (1964). Moreover, the discussion of the timeliness problem in *Lile* appears to be dictum, since the case was decided on the ground of exhaustion of administrative remedies. However, to the extent that the dis-

for filing petitions for review, evidences an attempt by Congress and the Commission to strike a balance between the need to have Commission orders operate with finality, and the aggrieved party's need to have both adequate notice of the substance of the decision, and sufficient time to prepare his petition.[4] To hold that the running of the 60-day period can be initiated by a mere telephone call, as the Commission urges, would create risk of inequity and hardship to aggrieved parties and defeat the goal of orderly and open administrative procedures embodied in the italicized portions of Rule 22(k) quoted above. Therefore, we conclude that the instant petition for review is not barred for reasons of untimeliness.

B. THE EXISTENCE OF A REVIEWABLE ORDER

The most difficult problems presented by this case arise from a congeries of related arguments supporting the general assertion that the Commission's decision regarding the Medical Committee's proxy

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cussion in *Lile* is useful to elucidate the present inquiry, it militates against the Commission's argument: the text of that opinion clearly reflects the court's concern that orders which assertedly had the effect of starting the running of the 60-day review period were not readily available for public inspection. *See* 324 F. 2d at 773.

M. G. Davis & Co. v. Cohen, 256 F. Supp. 128 (S.D.N.Y.), *aff'd*, 369 F. 2d 360 (2d Cir. 1966), which the Commission relies upon, is distinguishable in that it involved a different provision of the Rules of Practice which governed the issuance of orders initiating administrative proceedings and which did not include language comparable to that contained in Rule 22(k) relating to the parties' immediate right to inspect orders affecting them.

[4] For a discussion of an analogous problem of computation arising under the Federal Rules of Civil Procedure, *see* 4 C. Wright & A. Miller, Federal Practice and Procedure 632–42 (1969).

proposal is not a reviewable order within the relevan jurisdictional statute. That statute is section 25(a) o the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a (1964), which in pertinent part states:

> Any person aggrieved by an order issued b the Commission in a proceeding under thi chapter to which such person is a party ma obtain a review of such order * * * in th United States Court of Appeals for the Distric of Columbia [Circuit], by filing in such court within sixty days after the entry of such orde a written petition praying that the order of th Commission be modified or set aside in whol or in part.

Neither precedent[5] nor the legislative history of th Securities Act[6] offers an unambiguous answer to th question of whether decisions of the kind presentl before us should be categorized as reviewable orde

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[5] Dicta in a few cases and remarks by some scholarly con mentators tend to indicate that it has generally been assume that proxy decisions like the present one are not reviewable b the courts. *See, e.g., Klastorin* v. *Roth*, 353 F. 2d 182, 183 n. (2d Cir. 1965); Clusserath, *The Amended Stockholder Propos Rule: A Decade Later*, 40 N. D. Lawyer 13, 17 (1964). Hov ever, we have found no holding that proxy decisions like th present one are unreviewable, and no adequate analysis of th myriad arguments bearing on the jurisdictional question.

[6] The absence of any indication in the legislative history th Congress intended to preclude review serves to distinguish th instant controversy from *Schilling* v. *Rogers*, 363 U.S. 66 (1960), which the Commission heavily relies upon. *See, e.g* 363 U.S. at 671:

> The only express provision in the Trading with th Enemy Act for recourse to the courts by those claimi the return of property vested during World War II that contained in § 9(a). That section, however, is app cable only to persons not enemies or allies of enemies defined in the relevant statutes, and hence is not ava able to this petitioner, an enemy national. * * *
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> The question then is whether a right to such reli can fairly be implied. * * * The terms of § 32 a

under this provision; thus, we must resort to general principles and analogies in determining whether we have jurisdiction to adjudicate this controversy.

Bypassing for the moment the question of whether deference to administrative discretion should compel us to foreclose review of this petition,[7] we begin by restating the well-established principle that there is a strong presumption in favor of the courts' power to review administrative action. As the Supreme Court concluded in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), "[A] survey of our cases shows that judicial review of a final agency action

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its legislative history speak strongly against any such implication.

Cf. Heikkila v. *Barber*, 345 U.S. 229, 233 (1953): "Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action. Mere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it."

The *Schilling* case is further distinguishable because the administrative action there in issue was found to be wholly within the province of administrative discretion; *see* 363 U.S. at 674. As will be developed more fully below, we do not find the discretionary aspects of the Commission's action preclusive of review in the present controversy. Finally, it must be noted that the subject matter of the regulatory scheme in *Schilling* was permeated with overtones of foreign affairs and national defense policy—considerations which have always made the courts reluctant to review administrative action, and which obviously are totally lacking here. *See, e.g., Curran* v. *Laird*, —U.S. App. D.C.—, 420 F. 2d 122 (1969) (*en banc*).

[7] *See* part II C, *infra*. *Schilling* v. *Rogers*, 363 U.S. 666 (1960), which is discussed in the preceding footnote, clearly indicates that the issue of whether particular administrative action is rendered unreviewable by implication of a statute or by pragmatic concerns should be considered a different inquiry from the question of whether agency discretion precludes review.

by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." This theme has been developed at greater length by Professor Jaffe in his study of the law of reviewability:

> Congress, barring constitutional impediments, may indeed exclude judicial review. But judicial review is the rule. * * * It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest. * * *
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> * * * * *
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> * * * The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.

L. Jaffe, Judicial Control of Administrative Action 346, 357 (1965) [hereinafter "L. Jaffe"]. *See also Environmental Defense Fund, Inc.* v. *Hardin,* No. 23,813 (D.C. Cir. May 28, 1970) (slip op. at 7); *Scanwell Laboratories, Inc.* v. *Thomas,* No. 22,863 (D.C. Cir. Feb. 13, 1970); 4 K. Davis, Administrative Law Treatise 1–32 (1958).

Several other general observations which we have gleaned from our perusal of numerous cases and commentaries on reviewability must serve as prolegomena to our discussion of that issue in the present case. It appears that the factors most often relied upon in determining whether a particular administrative action is a reviewable order can be subdivided into two general categories. The first of these basic areas of concern involves consideration of whether the administrative action operates with final effect upon a partic-

ular individual, entity, or group.[8] *See, e.g., Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 149 (1967); *Isbrandtsen Co.* v. *United States,* 93 U.S. App. D.C. 293, 298, 211 F. 2d 51, 55, *cert. denied,* 347 U.S. 990 (1954); L. Jaffe, 358, 403–404. The second line of analysis looks to the formalities preceding and attending the administrative action, for, as one commentator has stated, "the notion of an 'order' implies some formal characteristics." L. Jaffe 419; *cf. Helco Products Co.* v. *McNutt,* 78 U.S. App. D.C. 71, 137 F. 2d 681 (1943); *American Sumatra Tobacco Corp.* v. *SEC,* 68 App. D.C. 77, 93 F. 2d 236 (1937). Finally, the cases in the area seem virtually unanimous in proclaiming that pragmatic considerations, particularly those relating to the institutional relationships between the courts and the administrative agencies, must prevail over purely doctrinal arguments for or against reviewability. *See, e.g., Abbott Laboratories, supra,* 387 U.S. at 149; *American Federation of Labor* v. *NLRB,* 308 U.S. 401, 408 (1940); *Cities Service Gas Co.* v. *FPC,* 255 F. 2d 860, 862 (10th Cir.), *cert. denied,* 358 U.S. 837 (1958); *Isbrandtsen Co., supra,* 93 U.S. App. D.C. at 297, 211 F. 2d at 55.

While the problem of whether there is sufficient formality is admittedly difficult in the present case, we need not pause long over the question of the decision's final effect upon petitioner. Here the administrative process had run its course with respect to petitioner's proxy proposal, and there can be no basis for any fear that review of the decision would cause the courts "to interfere in matters yet within the consideration of the Commission." *Cities Service Gas Co.,*

[8] Frequently these considerations are analyzed under one or more of the related doctrines of ripeness, finality, and exhaustion of administrative remedies; however, it is not uncommon to find these factors treated under the more general rubric of reviewability.

supra, 255 F. 2d at 862. Here, also, we are dealing with a limited and easily identifiable class of individuals—shareholders of a regulated corporation—whom Congress sought to protect in section 14 of the Act, and who claim that they are wrongfully being denied fair corporate suffrage by the Commission's approval of Dow's decision to omit their proposal. *Cf.* Jaffe, *The Individual Right to Initiate Administrative Process,* 25 Iowa L. Rev. 485, 528 (1940). In this regard, we cannot see any merit in the Commission's contention that the petitioner has not suffered any "aggrievement" under the jurisdictional statute because it may still have relief through a private action against the company in a district court. The relevance of a possible private action will be examined more fully later in this portion of our opinion. For present purposes, it is sufficient to note that the Medical Committee has been forced to undergo a two-stage administrative proceeding, compelled by the risk that failure to do so would preclude any judicial relief by virtue of the exhaustion doctrine;[9] its recourse to an authoritative judicial determination of the merits of its proxy proposal has been substantially delayed because of the administrative proceeding, whereas time is clearly of the essence in proxy contests; and not only has the Medical Committee lost the potential benefit of the Commission's resources and expertise as an ally in compliance litigation against the company, it has also had imposed upon it the added burden in a private action of overcoming an adverse Commission determination in face of the principle that the agency is entitled to judicial deference in the construction of its proxy rules. *See, e.g., Union Pacific R. Co.* v. *Chicago & N.W. Ry. Co.,* 226 F. Supp. 400, 408 (N.D. Ill. 1964). Moreover, we

[9] *See Peck* v. *Greyhound Corp.,* 97 F. Supp. 679 (S.D.N.Y. 1951).

believe that there is a substantial public interest in having important questions of corporate democracy raised before the Commission and the courts by interested, responsible private parties. *Cf. Scanwell Laboratories, Inc.* v. *Thomas,* No. 22,863 (D.C. Cir. Feb. 13. 1970) (slip op. at 8–10); *Environmental Defense Fund, Inc.* v. *Hardin,* No. 23,813 (D.C. Cir. May 28, 1970) (slip op. at 5–7). Thus, we conclude that the Medical Committee is "aggrieved" for purposes of section 25(a) of the Act.

Finally, in the context of assessing the reviewability of the Commission's decision—as distinguished from our later inquiry into the scope of administrative discretion—it is clear that no significance whatsoever inheres in the fact that the administrative determination is couched in terms of a "no action" decision rather than in the form of a decree binding a party to perform or refrain from some particular act. This much has been clear ever since the Supreme Court interred the discredited "negative order doctrine" in *Rochester Telephone Corp.* v. *United States.*[10] That case, like the present controversy, involved a petitioner's attempt to obtain judicial review of "action by the Commission which affects the complainant because it does no forbid or compel conduct with reference to him by a third person." (307 U.S. at 135.) The Court pointed out that "[n]egative has really been an obfuscating adjective" because it failed to illuminate "the real considerations on which rest * * * the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability." (307 U.S. at 141.) The Court then concluded:

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[10] 307 U.S. 125 (1939). *See generally* 4 K. Davis, Administrative Law Treatise 87–93 (1958).

> An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. * * * Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. * * * But this bears on the disposition of a case and should not control jurisdiction.

(307 U.S. at 142.) Similarly, section 10(e) of the Administrative Procedure Act provides judicial relief for "agency action unlawfully withheld or unreasonably delayed" (5 U.S.C. § 706(1) (Supp. V 1965–69)), and the courts have had little difficulty in determining when an administrative failure to act presents an appropriate occasion for judicial scrutiny. *Compare Environmental Defense Fund* v. *Hardin*, supra, *with International Ass'n of Machinists* v. *NMB*, No. 23,409 (D.C. Cir. Jan. 30, 1970); *see generally* Goldman, *Administrative Delay and Judicial Relief*, 66 Mich. L. Rev. 1423 (1968). Thus, there can be little doubt that the Commission's decision operates with sufficient particularity and finality to warrant judicial review.

The question of whether the procedures attending the Commission's decision in this case are sufficiently formal to make the determination a reviewable order under section 25(a) is admittedly a close one, but we believe that the considerations militating in favor of reviewability must prevail. At the outset, we note that the decided cases make it clear beyond doubt that the absence of a formal evidentiary hearing does not compel the conclusion that an administrative decision is unreviewable. *See, e.g., Cities Service Gas Co.* v. *FPC*, 255 F. 2d 860, 862–63 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958); *Phillips Petroleum Co.* v. *FPC*,

227 F. 2d 470, 475 (10th Cir. 1955), *cert. denied,* 350 U.S. 1005 (1956); *Isbrandtsen Co.* v. *United States,* 93 U.S. App. D.C. 293, 297, 211 F. 2d 51, 55, *cert. denied,* 347 U.S. 990 (1954). This is a sound and necessary doctrine because agencies frequently are confronted with situations in which substantial questions of fact, law, or policy may be properly resolved through information-gathering mechanisms less cumbersome than a trial-type hearing. This court has consistently recognized that this kind of flexibility in procedures is a desirable attribute of the administrative process, regardless of whether the power was explicitly provided by statute or rule, or was evolved on an ad hoc basis by implication from a broad statutory grant. However, our deference to the efficient deployment of administrative resources has not been—and logically could not be—considered a matter which touches upon the courts' jurisdiction to review the action in question, in the absence of a clear indication that Congress intended such a result. *See generally National Air Carrier Ass'n* v. *CAB,* No. 23,012 (D.C. Cir. May 28, 1970); *H & B Communications Corp.* v. *FCC.* No. 22,685 (D.C. Cir. Nov. 13, 1969); *Marine Space Enclosures, Inc.* v. *FMC,* — U.S. App. D.C. —, 420 F. 2d 577 (1969). Thus, we must look to the Commission's rules and to the attributes of the proceeding here in issue in order to determine whether this is an appropriate occasion for review.

Although the line is not drawn with complete clarity, the Commission's Rules of Practice distinguish between "formal" and "informal" proceedings. Procedures denominated "informal" by the Commission generally involve negotiation between the Commission and one private party, and normally culminate in a letter of advice to the party from a Commission staff

member.[11] Here, however, there is an important difference which the Commission readily concedes:

> The difference is that in the normal no-action situation, there is only one interested private

[11] 17 C.F.R. § 202.1 (1970) provides:

"The statutes administered by the Commission provide generally (1) for the filing with it of certain statements, such as * * * proxy solicitation material * * *; (2) for Commission determination through formal procedures of matters initiated by private parties or by the Commission; (3) for the investigation and examination of persons and records where necessary to carry out the purposes of the statutes. * * *

* * * * *

"(c) *The statutes and the published rules, regulations and forms thereunder prescribe the course and method of formal procedures to be followed in Commission proceedings.* These are supplemented where feasible by certain informal procedures designed to aid the public and facilitate the execution of the Commission's functions. * * *

"(d) The informal procedures of the Commission are largely concerned with the rendering of advice and assistance by the Commission's staff to members of the public dealing with the Commission." [Emphasis added.]

Informal negotiation also plays a large role in Commission hearings which are indubitably formal in nature; *see, e.g.*, 17 C.F.R. § 202.4 (1970):

"(a) Applications, declarations, and other requests involving formal Commission action after opportunity for hearing are scrutinized by the appropriate division for conformance with applicable statutory standards and Commission rules and generally the filing party is advised of deficiencies. * * *

"(b) After the staff has had an opportunity to study an application or declaration, interested persons may informally discuss the problems therein raised to the extent that time and the nature of the case permit. * * *

"(c) During the course of the hearings, the staff is generally available for informal discussions to reconcile bona fide divergent views not only between itself and other persons interested in the proceedings, but [also] among all interested persons; and, when circumstances permit, an attempt is made to narrow, if possible, the issues to be considered at the formal hearing."

> party and accordingly the Commission has not found it necessary to prescribe any rules dealing with the situation. The private party simply writes a letter which is answered.
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> In the case of stockholder proposals, there are two interested private parties: the management and the shareholder. Consequently, Rule 14a–8 (d) provides a procedure by which the position of both may be brought to the Commission's attention.

(Supplementary Memorandum of Respondent at 10.) Thus, the Commission's procedural regulations governing proxy proposals incorporate the basic theory of an adversary encounter, and a detailed perusal of Rule 14a–8 and its history reinforces this impression.

For the shareholder who wishes to have his proposal included in management's proxy statement, Rule 14a–8, 17 C.F.R. § 240.14a–8 (1970), is the touchstone of procedural and substantive rights. Rule 14a–8(a) describes the initiation of this process by providing that the security holder "shall submit to the management of the issuer, within the time hereinafter specified; a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting." The basic time period established in this section is 60 days, subject to certain qualifications. Subsection (b) then provides that if management opposes the shareholder's proposal, it must include in its proxy materials a 100-word statement by the proponent of the proposal. The substantive exceptions to the general rule of inclusion are then set forth in subsection (c), and several of these grounds for omitting a shareholder proposal will be discussed at length in part III, infra. The following provision, subsection (d), contains the procedural steps which are immediately relevant; it describes the course of proceedings which comes into play whenever management believes that it is entitled under the sub-

stantive criteria of the preceding section to omit a shareholder proposal.

Subsection (d) is phrased wholly in mandatory rather than permissive language. It requires management to "file with the Commission * * * a copy of the proposal and any statement in support thereof as received from the security holder, together with a statement of the reasons why the management deems such omission to be proper in the particular case, and, where such reasons are based on matters of law, a supporting opinion of counsel." At the same time, management must "notify the security holder submitting the proposal of its intention to omit the proposal" and "forward to him a copy of the statement of the reasons why the management deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel." This filing and forwarding must be completed "not later than 20 days prior to the date the preliminary copies of the proxy statement are filed pursuant to § 240.14a–6(a)"; this requirement was promulgated "[s]o that the Commission will have more time to consider the problems involved in such cases and the security holder will have an opportunity to consider the management's position and take such action as may be appropriate." 19 Fed. Reg. 246 (1954). Presumably this "other appropriate action" by the shareholder encompasses the possibility of filing with the Commission detailed legal arguments in favor of requiring the company to include the proposal, similar to the one which the Medical Committee filed with the Commission in the present case after the Division of Corporation Finance had made its recommendation, and which the Commission accepted without comment or objection. (App. 26a–32a; *see also id.* at 38a–39a.) Finally, the history of the rule explicitly states that it "places the

burden of proof upon the management to show that a particular security holder's proposal is not a proper one for inclusion in management's proxy material." (19 Fed. Reg. 246 (1954).)

We think that these provisions contain persuasive indicia that the Commission's proxy procedures are possessed of sufficient "adversariness" and "formality" to render its final proxy determinations amenable to judicial review, although the scope and content of that review must yet be investigated. This conclusion is inferentially supported by cases dealing with private actions to enforce the proxy rules, in which shareholders have been required to exhaust the administrative remedies provided by the foregoing sections. *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951); *cf. Dyer* v. *SEC*, 291 F. 2d 774, 778 (8th Cir. 1961). However, the Commission urges that the structure of section 14 of the Act gives rise to a doctrinal anomaly if administrative decisions like the present one are held reviewable. This difficulty arises from the fact that even when the Commission moves against recalcitrant management under section 14 of the Act to terminate or prevent violations of the proxy rules, there is never a traditional trial-type hearing followed by a conventional mandatory order. Professor Loss has catalogued the Commission's enforcement alternatives under section 14 as follows:

> [W]hen management or a security holder is adamant in refusing to comply with the rules as the Commission construes them, there is no administrative procedure comparable to the stop-order proceeding under the 1933 act. The Commission may investigate. It may use its statutory power to "punish information concerning * * * violations," as it did in two early instances. It may institute appropriate administrative proceedings of a disciplinary nature under the 1934 act when the offender happens

> to be a registered broker-dealer or an exchange member, as it may when some other statutory provision or Commission rule has been violated. It may even use a violation of section 14(a) as a basis for delisting the security. And it may ask the Attorney General to prosecute willful violations. But the principal sanction—and the only practicable way of forcing compliance—is the statutory action for injunction.

Loss *The SEC Proxy Rules in the Courts,* 73 Harv. L. Rev. 1041, 1043–44 (1960); *see also* Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties,* 31 N.Y.U. L. Rev. 875, 886, 886–87 n. 50 (1956).

We see little force in this anomaly—if, indeed, it is in fact an anomaly. Through section 14 of the Act Congress has invested the Securities and Exchange Commission with sweeping authority to regulate the solicitation of corporate proxies; the few words employed by Congress in subsection (a) of this provision confer upon the Commission much power, but little guidance or limitation:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce * * * or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy * * * in respect of any security (other than an exempted security) registered pursuant to * * * this title.

(15 U.S.C. § 78n(a) (1964).) Pursuant to this broad mandate, the Commission has established elaborate procedures which are of unquestioned validity for present purposes and which, as we have indicated

above, otherwise possess sufficient attributes of finality and formality to warrant judicial review. Viewing the proxy rules in this light, we see no substantial reason why the absence of formal adjudicatory hearings in the regulatory scheme should render Commission decisions, however capricious or erroneous, utterly immune to direct judicial review or redress. Indeed, it seems doubtful that there is any meaningful distinction between review in this situation and review in the commonly accepted context of judicial assessment of final agency determinations made well in advance of, or in collateral proceedings relating to, a statutorily prescribed trial-type hearing. *See, e.g., Phillips Petroleum Co.* v. *FPC,* supra, 227 F. 2d at 475; *Isbrandtsen Co.* v. *United States,* supra, 93 U.S. App. D.C. at 297, 211 F. 2d at 55.

On the other hand, we do see significant problems and anomalies which would result from accepting the Commission's restrictive interpretation of the jurisdictional statute. There is no doubt that the Medical Committee could obtain a judicial determination of the legitimacy of its claim through a private action against Dow Chemical in the district court; the Supreme Court held that such a remedy is implicit in section 14(a) in *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964). The essential question, then, is whether the district court is a more appropriate forum for adjudication of petitioner's claim than this court. We believe that every substantial consideration in this case leads to precisely the opposite conclusion.

Here the Medical Committee does not seek to contest any matters of fact which would require a trial de novo; rather, petitioner seeks only to have its proposal assessed by the Commission under a proper interpretation of the governing statutes and rules. The petitioner does not seek any relief which is peculiarly

within the competence of the district court; instead it seeks merely to have the cause remanded so that the Commission, in accord with proper standards, can make an enlightened determination of whether enforcement action would be appropriate. Thus we see no practical or theoretical virtues in commanding a course of action which "would result in equal inconvenience" to the petitioner, the Commission, and the overcrowded courts, and "would consitute circuitous routes for the determination of issues easily and directly determinable by review in this court." *American Sumatra Tobacco Corp.* v. *SEC,* 68 App. D.C. 77, 82, 93 F. 2d 236, 241 (1937). *See also Gardner* v. *Toilet Goods Ass'n, Inc.,* 387 U.S. 167, 191–93 (1967) (Justice Fortas concurring and dissenting); *Environmental Defense Fund, Inc.* v. *Hardin,* supra, (slip op. at 9); L. Jaffe 358.

There is also, it seems to us, an independent public interest in having the controversy decided in its present posture rather than in the context of a private action against the company. The primary and explicit purpose of section 14(a) is "the protection of investors," and the primary method of implementing this goal is through Commission regulation of proxy statements, not through private actions by individual security holders. For the small investor, personal recourse to the Commission's proxy procedures without benefit of counsel may well be the only practicable method of contesting a management decision to exclude his proxy proposal.[12] In this situation, as our

[12] This contention was recently presented to the Commission in a proxy contest involving the General Motors Corporation. *See* Cong. Rec. E–2147 (daily ed., March 17, 1970):

"It must be recognized that Management's proxy statement is the only effective vehicle through which all of the shareholders can have an opportunity to express themselves, and even to hear any arguments on the questions involved. * * * [T]he cost

recent decisions make clear, it is particularly important that the Commission look carefully at the merits of the shareholder's proposal, and that it do so pursuant to an accurate perception of the Congressional intent underlying the proxy statute. *See generally Hale* v. *FCC,* No. 22,751 (D.C. Cir. Feb. 16, 1970) (slip op. at 15–17; concurring opinion); *Office of Communication of the United Church of Christ* v. *FCC,* No. 19,409 (D.C. Cir. June 20, 1969). Direct judicial review of Commission proxy decisions is unquestionably the most logical and efficient means of achieving this objective.

Thus, we hold that the Commission's decision in this case is presently reviewable, and turn our attention to an investigation of the proper scope of this review.

C. Scope of Review and Administrative Discretion

Many of the Commission's most forceful arguments are addressed to the proposition that the action which the Medical Committee now asks us to review falls within the purview of administrative discretion and therefore is protected from judicial inquiry or interference by section 10 of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (Supp. V. 1965–69). In large masure, this line of defense reflects the misconstruction of section 10 that Professor Davis has called

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[of conducting a competing solicitation] is virtually prohibitive except to extremely well heeled shareholders * * *. This is no ordinary dispute with Management: it is not an effort by insurgent shareholders to seize control of the corporation. If it were so, one could justify large expenditures because the individual rewards are great and because, if successful, the insurgents could obtain reimbursement of their expenses from the company. The issues here lack that personal pecuniary bias. Denial of access to the shareholders through management's proxy solicitation, practically speaking, is total denial."

an "all or none fallacy" which ignores the language and intent of this provision.[13] The more accurate interpretation of the statute holds that assertions of discretion inevitably raise questions of degree which must be appraised in the context of the relevant provisions of law and the nature of the particular action sought to be reviewed: "[T]he question is not *whether* agency action is by law committed to agency discretion but *to what extent* agency action is so committed." 4 K. Davis, Administrative Law Treatise 33 (1958) (italic added); *see also Scanwell Laboratories, Inc.* v. *Thomas*, No. 22,863 (D.C. Cir. Feb. 13, 1970) (slip op. at 28–29). Our decisions also make clear that in analyzing issues of administrative discretion, as in dealing with general questions of reviewability, we must be fully cognizant of the strong presumption in favor of judicial review. *Environmental Defense Fund, Inc.* v. *Hardin*, No. 23,813 (D.C. Cir. May 28, 1970) (slip op. at 7–8).

The Commission asserts that its enforcement activities pursuant to the proxy rules are entitled to particular deference because they partake of the nature of the prosecutorial function, which has traditionally been considered immune to judicial review.[14] This

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[13] 4 K. Davis, Administrative Law Treatise 33 (1958). We note that Professor Davis espouses a more restrictive role for the courts in reviewing the discretionary acts of administrative agencies than that which is urged by other scholarly commentators. *See, e.g.*, Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L. J. 965 (1969), and authorities cited *id.* at 966 n. 9.

[14] *But cf.* K. Davis, Discretionary Justice 225–26, 229 (1969):

"In the regulatory agencies, abuse of the power to prosecute or not to prosecute may be ten times as frequent as abuse of the power of formal adjudication and therefore may be ten times as damaging to justice. * * *

* * * * *

The prosecuting power everywhere, whether exercised by

contention is meritorious, as will be seen below, but only in a limited sense; and the decisions of this court have never allowed the phrase "prosecutorial discretion" to be treated as a magical incantation which automatically provides a shield for arbitrariness. Indeed, we have explicitly alluded to the prosecutorial function in compelling an administrative agency to deal openly and fairly with public interest intervenors in licensing proceedings:

> [A] "Public Intervenor" * * * is, in this context, more nearly like a complaining witness who presents evidence to the police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.
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> * * * It was not the correct role of the Examiner or the Commission to sit back and simply provide a forum for the intervenors; the Commission's duties did not end by allowing Appellants to intervene; its duties began at that stage.

Office of Communication of the United Church of Christ v. *FCC*, No. 19,409 (D.C. Cir. June 20, 1969) (slip op. at 6).

There is some reason to believe that similar judicial supervision of the administrative process is needed in

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police, by prosecutors, by regulatory agencies, or by other administrators, can and should be highly structured by both rules and precedents. * * *

* * * * *

"The American assumption that prosecutors' discretion should not be judicially reviewable developed when executive functions were generally unreviewable. The assumption is in need of reexamintion in light of the twentieth century discovery that courts can review executive action to protect against abuses while at the same time avoiding judicial assumption of the executive power."

circumstances like the present one, in order to assure that the investing public can obtain vigorous, efficient, and evenhanded implementation of the concepts of corporate democracy embodied in the proxy rules. One published study has accused the Commission of a variety of procedural sins in its regulation of proxies, most of which could be curtailed or eliminated through judicial review. Specifically, the Commission has been charged with repeatedly violating its own established procedural principles, particularly those relating to management's burden of proof in justifying the omission of proposals; of allowing non-lawyers to decide complex legal problems raised in proxy disputes; and of affording inconsistent treatment to similar factual situations for no apparent reason.[15] Perhaps the most serious charges against the Commission's secretive decision-making, however, is all too clearly illustrated by the record in the present case: the lack of articulated bases for past decisions encourages management to file shotgun objections to a shareholder proposal, urging every mildly plausible legal argument that inventive counsel can contrive, in the hope that the Commission will accept on of them.[16] If the Commission does agree with one of management's arguments, or if it determines not to act against the company for other reasons, the shareholder often has no idea why his proposal was deemed unworthy or what he can do to cure its defects for subsequent proxy solicitations. Viewed in this light, "discretion" can be merely another manifestation of the venerable bureaucratic technique of exclusion by attrition, of disposing of controversies through calculated non-decisions that will eventually cause

[15] Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 N. D. Lawyer 13 (1964).

[16] *See id.* at 43.

eager supplicants to give up in frustration and stop "bothering" the agency.

Nevertheless, we recognize that there is a legitimate domain of administrative discretion in the proxy area, albeit not quite so broad as the Commission urges. As the Supreme Court has recognized, the Securities and Exchange Commission must process a formidable number of proxy statements in limited time and with insufficient manpower.[17] Obviously not all proxy proposals can or should be given detailed consideration by the full Commission, and even the boldest advocates of judicial review recognize that the agencies' internal management decisions and allocations of priorities are not a proper subject of inquiry by the courts.[18] However, that is definitely not what is at issue in the present case: here, the full Commission has exercised its discretion to review this controversy, and, as will be seen below, it has ostensibly acted in accord with a very dubious legal theory. The Medical Committee asks us merely to examine this allegedly erroneous legal premise and return the controversy to the Commission so that it may properly exercise its further discretion regarding the propriety and desirability of enforcement activity.[19]

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[17] *Cf. J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964):

"The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it."

[18] *Cf. Environmental Defense Fund, Inc.* v. *Hardin*, supra, slip. op at 10; Goldman, *Administrative Delay and Judicial Relief*, 66 Mich. L. Rev. 1423, 1426–31 (1968).

[19] Were we to compel the Commission either to entertain administrative review of a staff decision in the first instance, or to undertake particular enforcement activity upon remand, our

Limited and partial review to examine the legal framework within which administrative discretion must be exercised is scarcely a doctrinal innovation; it has been repeatedly sustained by the Supreme Court. *See, e.g., McGrath* v. *Kristensen,* 340 U.S. 162, 169 (1950); *Perkins* v. *Elg,* 307 U.S. 325, 349–50 (1939). We think that Justice Frankfurter's incisive observations in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 136 (1939), are equally appropriate here:

> Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles.

We foresee scant possibility that such sharply circumscribed review, which depends upon the Commission's initial determination to review the staff decision, will cause the destruction of informal advisory and supervisory functions which the Commission now fears. The courts, we think, are abundantly capable of distinguishing between situations in which an agency gives informal advice and situations in which it for-

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decision might well conflict with the precedents which the Commission has cited involving petitioners' attempts to have courts order the Commission to initiate investigations pursuant to different sections of the Act. *See Dyer* v. *SEC,* 291 F. 2d 774 (8th Cir. 1961); *Leighton* v. *SEC,* 95 U.S. App. D.C. 217, 221, F. 2d 91 *cert. denied,* 350 U.S. 825 (1955). We note, however, that other circuits in dealing with action by other agencies have occasionally circumscribed administrative discretion to undertake investigatory activities. *See, e.g., Trailways of New England, Inc.* v. *CAB,* 412 F. 2d 926, 931–33 (1st Cir. 1969).

mally decides among conflicting adversary claims premised on detailed legal arguments. Moreover, experience indicates that the grim forebodings which are frequently expressed in this court regarding the possibility that a particular decision will cause irreparable disruption of the administrative process only rarely, if ever, come to pass.[20]

On the other hand, if we were to foreclose review as the Commission urges, we would surely be condoning a frustration of congressional intent; for here the petitioner asserts that the Commission is failing to correct abuses which Congress sought to end by enacting the statute, and that it is a member of the class which Congress endeavored to protect in the Securities Act. In such situations, as a leading commentator has phrased it, "[i]nterests intended as the beneficiaries of legislative munificence will have cold comfort from embracing the dry, unmoving skeleton of the statute.[21] Review limited to the task of correcting such legal defects is consistent with the Supreme Court's interpretation of the Securities Act in *J. I. Case* v. *Borak*, 377 U.S. 426, 432 (1964): "[A]mong [the] chief purposes [of section 14(a)] is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." Therefore, we conclude that partial review of the merits of this controversy will not project us into an area which is committed by law to agency discretion.

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[20] *Cf. Goodman* v. *United States*, No. 22,521 (D.C. Cir. Jan. 30, 1970) (slip op. at 9): "Words like 'chaos' and 'impossible situation' fall readily from bureaucratic lips when confronted with the prospect of doing something not absolutely required by the book." *See also Scanwell Laboratories, Inc.* v. *Thomas*, No. 22,863 (D.C. Cir. Feb. 13, 1970) (slip op. at 25–26).

[21] Jaffe, *The Individual Right to Initiate Administrative Process*, 25 Iowa L. Rev. 485 (1940).

III. The Merits of Petitioner's Proposal

The Medical Committee's sole substantive contention in this petition is that its proposed resolution could not, consistently with the Congressional intent underlying section 14(a), be properly deemed a proposal which is either motivated by *general* political and moral concerns, or related to the conduct of Dow's ordinary business operations. These criteria are two of the established exceptions to the general rule that management must include all properly submitted shareholder proposals in its proxy materials. They are contained in Rule 14a-8(c), 17 C.F.R. § 240.14a-8(c) (1970), which provides in relevant part:

> * * * [M]anagement may omit a proposal * * * from its proxy statement and form of proxy under any of the following circumstances:
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> * * * * *
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> (2) If it clearly appears that the proposal is submitted by the security holder * * * primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes; or
>
> * * * * *
>
> (5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer.

Despite the fact that our October 13 order in this case deferred resolution of the jurisidictional issue pending full argument on the merits (*see* part I, supra), the Commission has not deigned to address itself to any possible grounds for allowing management to exclude this proposal from its proxy statement. We confess to a similar puzzlement as to how the Commission reached the result which it did, and thus

we are forced to remand the controversy for a more illuminating consideration and decision. *Cf. Environmental Defense Fund, Inc.* v. *Hardin,* supra. In aid of this consideration on remand, we feel constrained to explain our difficulties with the position taken by the company and endorsed by the Commission.

It is obvious to the point of banality to restate the proposition that Congress intended by its enactment of section 14 of the Securities Exchange Act of 1934 to give true vitality to the concept of corporate democracy. The depth of this commitment is reflected in the strong language employed in the legislative history:

> Even those who in former days managed great corporations were by reason of their personal contacts with their shareholders constantly aware of their responsibilities. But as management became divorced from ownership and came under the control of banking groups, men forgot they were dealing with the savings of men and the making of profits became an impersonal thing. When men do not know the victims of their aggression they are not always conscious of their wrongs. * * *
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> * * * * *
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> Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange. Managements of properties owned by the investing public should not be permitted to perpetuate themselves by the misuse of corporate proxies.

H.R. Rep. No. 1383, 73d Cong., 2d Sess. 5, 13 (1934). *See also SEC* v. *Transamerica Corp.,* 163 F. 2d 511, 517, 518 (3d Cir. 1947), *cert. denied,* 332 U.S. 847 (1948).

In striving to implement this open-ended mandate, the Commission has gradually evolved its present proxy rules. Early exercises of the rule-making power

were directed primarily toward the achievment of full and fair corporate disclosure regarding management proxy materials (*see, e.g.*, 3 Fed. Reg. 1991 (1938); 5 Fed. Reg. 174 (1940); the rationale underlying this development was the Commission's belief that the corporate practice of circulating proxy materials which failed to make reference to the fact that a shareholder intended to present a proposal at the annual meeting rendered the solicitation inherently misleading. *See Hearings on Security and Exchange Commission Proxy Rules Before the House Comm. on Interstate and Foreign Commerce,* 78th Con., 1st Sess., pt. 1, at 169–70 (1943) [hereinafter "House Hearings"]. From this position, it was only a short step to a formal rule requiring management to include in its proxy statement any shareholder proposal which was a "a proper subject for action by the security holders." 7 Fed. Reg. 10,659 (1942). It eventually became clear that the question of what constituted a "proper subject" for shareholder action was to be resolved by recourse to the law of the state in which the company had been incorporated; however, the paucity of applicable state law giving content to the concept of "proper subject" led the Commission to seek guidance from precedent existing in jurisdictions which had a highly developed commercial and corporate law, and to develop its own "common law" relating to proper subjects for shareholder action. *See generally* II L. Loss, Securities Regulation 905–06 (1961); *Hearings on SEC Enforcement Problems Before a Subcom. of the Senate Comm. on Banking and Currency,* 85th Cong., 1st Sess., pt. 1, at 118 (1957) [hereinafter "Senate Hearings"].

Further areas of difficulty became apparent as experience was gained in administering the "proper subject" test, and these conflicts provided the Com-

mission with opportunities to put a detailed gloss upon the general phraseology of its rules. Thus in 1945 the Commission issued a release containing an opinion of the Director of the Division of Corporation Finance that was rendered in response to a management request to omit shareholder resolutions which bore little or no relationship to the company's affairs; for example, these shareholder resolutions included proposals "that the anti-trust laws and the enforcement thereof be revised," and "that all Federal legislation hereafter enacted providing for workers and farmers to be represented should be made to apply equally to investors."[22] The Commission's release endorsed the Director's conclusion that "proposals which deal with general political, social or economic matters are not, within the meaning of the rule, 'proper subjects for action by security holders.' "[23] The reason for this conclusion was summarized as follows in the Director's opinion:

> Speaking generally, *it is the purpose of Rule X–14A–7 to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation;* that is, such matters relating to the affairs of the company concerned as are proper subjects for stockholders' action under the laws of the state under which it was organized. It was not the intent of Rule X–14A–7 to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature. *Other forums exist for the presentation of such views.*[24]

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[22] Securities Exchange Act Release No. 3638 (Jan. 3, 1945), Brief for Petitioner at Addendum p. 2–3.

[23] *Id.* at Addendum p. 2.

[24] *Id.* at Addendum p. 3 (italic added).

Several years after the Commission issued this release, it was confronted with the same kind of problem when the management of a national bus company sought to omit a shareholder proposal phrased as "A Recommendation that Management Consider the Advisability of Abolishing the Segregated Seating System in the South"—a proposal which, on its face, was ambiguous with respect to whether it was limited solely to company policy rather than attacking all segregated seating, and which quite likely would have brought the company into violation of state laws then assumed to be valid.[25] The Commission staff approved management's decision to omit the proposal, and the shareholder then sought a temporary injunction against the company's solicitation in a federal district court. The injunction was denied because the plaintiff had failed to exhaust his administrative remedies or to show that he would be irreparably harmed by refusal to grant the requested relief. *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951). The Commission amended its rules the following year to encompass the above-quoted exception for situations in which "it clearly appears that the proposal is submitted by the security holder * * * primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes." 17 Fed. Reg. 11,433 (1952); *see also id.* at 11,431. So far as we have been able to determine, the Commission's interpretation or application of this rule has not been considered by the courts.

The origins and genesis of the exception for proposals "relating to the conduct of the ordinary business operations of the issuer" are somewhat more

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[25] *See* Emerson & Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. Chi. L. Rev. 807, 833 (1952); Cong. Rec. E-2149 (daily ed. March 17, 1970).

obscure. This provision was introduced into the proxy rules in 1954, as part of amendments which were made to clarify the general proposition that the primary source of authority for determining whether a proposal is a proper subject for shareholder action is state law. *See* 19 Fed Reg. 246 (1954). Shortly after the rule was adopted, the Commission explained its purpose to Congress in the following terms:

> The policy motivating the Commission in adopting the rule * * * is basically the same as the underlying policy of most State corporation laws to confine the solution of ordinary business problems to the board of directors and place such problems beyond the competence and direction of the shareholders. The basic reason for this policy is that is is manifestly impracticable in most cases for stockholders to decide management problems at corporate meetings.
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> * * * * *
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> * * * While rule X–14A–8 does not require that the ordinary business operations be determined on the basis of State law, the premise of Rule X–14A–8 is that the propriety of * * * proposals for inclusion in the proxy statement is to be determined in general by the law of the State of incorporation. * * * Consistency with this premise requires that the phrase "ordinary business operations" in rule X–14A–8 have the meaning attributed to it under applicable State law. To hold otherwise would be to introduce into the rule the possibility of endless and narrow interpretations based on no ascertainable standards.

(Senate Hearings at 118.) It also appears that no administrative interpretation of this exception has yet been scrutinized by the courts.

These two exceptions are, on their face, consistent with the legislative purpose underlying section 14; for

it seems fair to infer that Congress desired to make proxy solicitations a vehicle for *corporate* democracy rather than an all-purpose forum for malcontented shareholders to vent their spleen about irrelevant matters,[26] and also realized that management cannot exercise its specialized talents effectively if corporate investors assert the power to dictate the minutiae of daily business decisions. However, it is also apparent that the two exceptions which these rules carve out of the general requirement of inclusion can be construed so as to permit the exclusion of practically any shareholder proposal on the grounds that it is either "too general" or "too specific." Indeed, in the present case Dow Chemical Company attempted to impale the Medical Committee's proposal on both horns of this

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[26] *See, e.g.*, the following colloquy, which appears in House Hearings at 162–63:

"Mr. BOREN. So one man, if he owned one share in A.T. & T. * * * and another share in R.C.A. * * * if he decided deliberately * * * to become a professional stockholder in each one of the companies—he could have a hundred-word propaganda statement prepared and he could put it in every one of these proxy statements. Suppose he were a Communist.

"Commissioner PURCELL. That is possible. We have never seen such a case.

"Mr. BOREN. Suppose a man were a Communist and he wanted to send to all of the stockholders of all of these firms, a philosophic statement of 100 words in length, or a propaganda statement. * * * He could by the mere device of buying one share of stock * * * have available to him the mailing list of all the stockholders in the Radio Corporation of America.

* * * * *

"Commissioner PURCELL. Of course, we have never seen such a case; and if such a case came before us, then we would have to deal with it and make such appropriate changes as might seem necessary" * * *.

dilemma: in its memorandum of counsel, it argued that the Medical Committee's proposal was a matter of ordinary business operations properly within the sphere of management expertise and, at the same time, that the proposal clearly had been submitted primarily for the purpose of promoting general political or social causes. (App. 9a–10a; *see also id.* at 19a.) As noted above, the Division of Corporation Finance made no attempt to choose between these potentially conflicting arguments, but rather merely accepted Dow Chemical's decision to omit the proposal "[f]or reasons stated in [the company's] letter and the accompanying opinion of counsel, both dated January 17, 1969"; [27] this determination was then adopted by the full Commission. Close examination of the company's arguments only increases doubt as to the reasoning processes which led the Commission to this result.

In contending that the Medical Committee's proposal was properly excludable under Rule 14a–8(c)(5), Dow's counsel asserted:

> It is my opinion that *the determination of the products which the company shall manufacture,* the customers to which it shall sell the products, and the conditions under which it shall make such sales are related to the conduct of the ordinary business operations of the Company and that any attempt to amend the Certificate of Incorporation to define the circumstances under which the management of the Company shall make such determinations is contrary to the concept of corporate management, which is in-

[27] App. 20a. The letter referred to by the Division merely contains a citation to the proxy rules and a reference to the opinion of counsel (see App. 12a); thus, for present purposes the only relevant argument is that contained in the memorandum of counsel.

herent in the Delaware General Corporation Act under which the Company is organized.[28]

In the first place, it seems extremely dubious that this superficial analysis complies with the Commission's longstanding requirements that management must sustain the burden of proof when asserting that a shareholder proposal may properly be omitted from the proxy statement, and that "[w]here management contends that a proposal may be omitted because it is not proper under State law, it will be incumbent upon management to refer to the applicable statute or case law." 19 Fed. Reg. 246 (1954). As noted above, the Commission has formally represented to Congress that Rule 14a–8(c)(5) is intended to make state law the governing authority in determining what matters are ordinary business operations immune from shareholder control; yet, the Delaware General Corporation law provides that a company's Certificate of Incorporation may be amended to "change, substitute, enlarge or diminish the nature of [the company's] busi-

[28] App. 9a (emphasis added). The remainder of the company's argument under Rule 14a–8(c)(5) reads as follows, in its entirety:

"Moreover, there is considerable doubt as to the efficacy of the proposed limitation in the context of the ability of the Government of the United States to issue a directive that the Company manufacture napalm. Therefore, the proposed limitation could conceivably be contrary to the requirements of the Defense Production Act of 1950."

(App. 9a–10a.) In response to this contention, the Medical Committee pointed out that "any such amendment would, of course, be subject to the requirements of the 'Defense Production Act of 1950,' as are the corporate charters and management decisions of all United States Corporations." (App. 16a.) No rebuttal by Dow was forthcoming.

ness."[29] If there are valid reasons why the Medical Committee's proposal does not fit within the language and spirit of this provision, they certainly do not appear in the record.

The possibility that the Medical Committee's proposal could properly be omitted under Rule 14a–8(c)(2) appears somewhat more substantial in the circumstances of the instant case, although once again it may fairly be asked how Dow Chemical's arguments on this point could be deemed a rational basis for such a result: the paragraph in the company's memorandum of counsel purporting to deal with this issue, which is set forth in the margin,[30] consists entirely of a fundamentally irrelevant recitation of

[29] Chapter 1, Title 8 Delaware Code §§ 242(a)(2), 242(d)(19—). *Cf.* II L. Loss, Securities Regulation 906 (1961): "Inevitably the Commission, while purporting to find and apply a generally nonexistent state law, has been building up a 'common law' of its own as to what constitutes a 'proper subject' for shareholder action. It is a 'common law' which undoubtedly would yield, as it should, to a contrary decision of the particular state court."

[30] App. 10a:

"It is a well-known fact that the Company has been the target of protests and demonstrations for the past few years at its office and plant locations, and on the occasion of recruiting on college and university campuses, as well as at its annual meeting of stockholders held May 8, 1968. The various protests and demonstrations are a reflection of opposition on the part of certain segments of the population against the policy of the United States Government in waging the war in Viet Nam. Although The Dow Chemical Company was not among the 100 largest prime contractors with the Department of Defense during the 1967–68 Government fiscal year and was only 75th on the list in the 1966–67 fiscal year, it appears to have been singled out symbolically by the protesters. Under all of these circumstances it is my opinion that it clearly appears that the proposal is primarily for the purpose of promoting a general political, social or similar cause."

some of the political protests which had been directed at the company because of its manufacture of napalm, followed by the abrupt conclusion that management is therefore entitled to exclude the Medical Committee's proposal from its proxy statement. Our own examination of the issue raises substantial questions as to whether an interpretation of Rule 14a–8(c)(2) which permitted omission of this proposal as one motivated primarily by *general* political or social concerns would conflict with the congressional intent underlying section 14(a) of the Act.

As our earlier discussion indicates, the clear import of the language, legislative history, and record of administration of section 14(a) is that its overriding purpose is to assure to corporate shareholders the ability to exercise their right—some would say their duty [31]—to control the important decisions which affect them in their capacity as stockholders and owners of the corporation. Thus, the Third Circuit has cogently summarized the philosophy of section 14(a) in the statement that "[a] corporation is run for the benefit of its stockholders and not for that of its managers." *SEC* v. *Transamerica Corp.*, 163 F. 2d 511, 517 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948). Here, in contrast to the situations detailed

[31] *See* Bayne, *The Basic Rationale of Proper Subject*, 34 U. Det. L. J. 575, 579 (1957):

"In so far as the shareholder has contributed an asset of value to the corporate venture, in so far as he has handed over his goods and property and money for use and increase, he has not only the clear right, but more to the point, perhaps, he has the stringent duty to exercise control over that asset for which he must keep care, guard, guide, and in general be held seriously responsible.

" * * * As much as one may surrender the immediate disposition of [his] goods, he can never shirk a supervisory and secondary duty (not just a right) to make sure these goods are used justly, morally and beneficially."

above which led to the promulgation of Rule 14a-8(c)(2), the proposal relates solely to a matter that is completely within the accepted sphere of corporate activity and control. No reason has been advanced in the present proceedings which leads to the conclusion that management may properly place obstacles in the path of shareholders who wish to present to their co-owners, in accord with applicable state law, the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy. Thus, even accepting Dow's characterization of the purpose and intent of the Medical Committee's proposal, there is a strong argument that permitting the company to exclude it would contravene the purpose of section 14(a).

However, the record in this case contains indications that we are confronted with quite a different situation. The management of Dow Chemical Company is repeatedly quoted in sources which include the company's own publications as proclaiming that the decision to continue manufacturing and marketing napalm was made not *because* of business considerations, but *in spite of* them; that management in essence decided to pursue a course of activity which generated little profit for the shareholders and actively impaired the company's public relations and recruitment activities because management considered this action morally and politically desirable. (App. 40a–43a; *see also id.* at 33.) The proper political and social role of modern corporations is, of course, a matter of philosophical argument extending far beyond the scope of our present concern; the substantive wisdom or propriety of particular corporate political decisions is also completely irrelevant to the resolution of the present controversy. What *is* of immedi-

ate concern, however, is the question of whether the corporate proxy rules can be employed as a shield to isolate such managerial decisions from shareholder control.[32] After all, it must be remembered that "[t]he control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a)." *SEC* v. *Transamerica Corp.*, supra, 163 F. 2d at 518. We think that there is a clear and compelling distinction between management's legitimate need for freedom to apply its expertise in matters of day-to-day business judgment, and management's patently illegitimate claim of power to treat modern corporations with their vast resources as personal satrapies implementing personal political or moral predilections. It could scarcely be argued that management is more qualified or more entitled to make these kinds of decisions than the shareholders who are the true beneficial owners of the corporation; and it seems equally implausible that an application of the proxy rules which permitted such a result could be harmonized with the philosophy of corporate democracy which Congress embodied in section 14(a) of the Securities Exchange Act of 1934.

In light of these considerations, therefore, the cause must be remanded to the Commission so that it may reconsider petitioner's claim within the proper limits of its discretionary authority as set forth above, and so that "the basis for [its] decision [may] appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review." [33]

Remanded for further proceedings consistent with this opinion.

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[32] *Cf.* Note, *Corporate Political Affairs Programs*, 70 Yale L. J. 821, 846–47 (1961).

[33] *Environmental Defense Fund, Inc.* v. *Hardin*, No. 23,813 (D.C. Cir. May 28, 1970) (slip op. at 11).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

September Term, 1969

Petition for Review of an Order of the Securities and Exchange Commission.

Before: McGOWAN, TAMM, and ROBINSON, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the record from the Securities & Exchange Commission, and was argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that this case is hereby remanded to the Securities and Exchange Commission for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam,
For the Court.
NATHAN J. PAULSON,
Clerk.

Dated: JULY 8, 1970.
Opinion per Circuit Judge TAMM.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

September Term, 1969

Before: McGOWAN, TAMM, and ROBINSON, *Circuit Judges*, in Chambers.

ORDER

On consideration of respondent's petition for rehearing, it is

ORDERED by the Court that respondent's aforesaid petition is denied.

Per Curiam,
For the Court.
NATHAN J. PAULSON,
Clerk.

Filed: AUGUST 26, 1970.

APPENDIX D

Relevant Statutes and Rule

Section 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, as amended, 15 U.S.C. 78n(a):

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

Section 21(e) of the Securities Exchange Act of 1934, 48 Stat. 900, as amended, 15 U.S.C. 78u(e):

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute

the necessary criminal proceedings under this chapter.

Section 25(a) of the Securities Exchange Act of 1934, 48 Stat. 901–902, as amended, 15 U.S.C. 78y(a):

> Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person is a party may obtain a review of such order in the United States Court of Appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and condi-

tions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

Rule 14(a)–8 under the Securities Exchange Act of 1934, 17 C.F.R. 240. 14a–8:

Proposals of security holders.

(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer, within the time hereinafter specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify it in its form of proxy and provide means by which security holders can make the specification provided for by Rule 14a–4(b) (§ 240.14a–4(b)). The management of the issuer shall not be required by this rule to include the proposal in its proxy statement for an annual meeting unless the proposal is submitted to the management not less than 60 days in advance of a day corresponding to the first date on which the management's proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, except that if the date of the annual meeting has been changed as a result of a change in the fiscal year, a proposal shall be submitted a reason-

able time before the solicitation is made. A proposal to be presented at any other meeting shall be submitted to the management of the issuer a reasonable time before the solicitation is made. This section does not apply, however, to elections to office or to counter proposals to matters to be submitted by the management.

(b) If the management opposes the proposal it shall also, at the request of the security holder, include in its proxy statement a statement of the security holder, in not more than 100 words, in support of the proposal, which statement shall not include the name and address of the security holder. The proxy statement shall also include either the name and address of the security holder or a statement that such information will be furnished by the issuer or by the Commission to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor. If the name and address of the security holder is omitted from the proxy statement, it shall be furnished to the Commission at the time of filing the management's preliminary proxy material pursuant to Rule 14a–6(a) (§240.14a–6(a)). The statement and request of the security holder shall be furnished to the management at the same time that the proposal is furnished. Neither the management nor the issuer shall be responsible for such statement.

(c) Notwithstanding the foregoing, the management may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances:

(1) If the proposal as submitted is, under the laws of the issuer's domicile, not a proper subject for action by security holders; or

(2) If it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the

purpose of promoting general economic, political, racial, religious, social or similar causes; or

(3) If the management has at the security holder's request included a proposal in its proxy statement and form of proxy relating to either of the last two annual meetings of security holders or any special meeting held subsequent to the earlier of such two annual meetings and such security holder has failed without good cause to present the proposal, in person or by proxy, for action at the meeting; or

(4) If substantially the same proposal has previously been submitted to security holders, in the management's proxy statement and form of proxy, relating to any annual or special meeting of security holders held within the preceding five calendar years, it may be omitted from the management's proxy material relating to any meeting of security holders held within the three calendar years after the latest such previous submission: *Provided,* That:

(i) If the proposal was submitted at only one meeting during such preceding period, it received less than 3 percent of the total number of votes cast in regard thereto; or

(ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than 6 percent of the total number of votes cast in regard thereto; or

(iii) If the proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto.

(5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer.

(d) Whenever the management asserts that a proposal and any statement in support thereof may properly be omitted from its proxy statement and form of proxy, it shall file with the Commission, not later than 20 days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to § 240.14a–6(a), or such shorter period prior to such date as the Commission may permit, a copy of the proposal and any statement in support thereof as received from the security holder, together with a statement of the reasons why the management deems such omission to be proper in the particular case, and, where such reasons are based on matters of law, a supporting opinion of counsel. The management shall at the same time, if it has not already done so, notify the security holder submitting the proposal of its intention to omit the proposal from its proxy statement and form of proxy and shall forward to him a copy of the statement of the reasons why the management deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel.

APPENDIX E

MINUTE OF SECURITIES AND EXCHANGE COMMISSION ACTION APPEARING IN THE OFFICIAL MINUTE RECORD OF COMMISSION ACTIONS

MARCH 24, 1969.

Re: Dow Chemical Company
(File 1-3433)

Reference was made to proxy material filed pursuant to Regulation 14 of the Rules and Regulations under the Securities Exchange Act of 1934 by Dow Chemical Company (File 1-3433) for use in connection with its annual meeting of stockholders scheduled for May 7, 1969.

Upon the recommendation of the Division of Corporation Finance contained in two memoranda dated March 18, 1969, the Commission determined to raise no objection to the omission from the management's proxy statement of certain resolutions proposed by the Medical Committee for Human Rights. The Commission also denied the request of counsel for the Committee to be heard by the Commission in the matter.

ORVAL L. DUBOIS,
Secretary.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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FILED
FEB 25 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PHILIP A. LOOMIS, JR.,
General Counsel,
Securities and Exchange Commission,
Washington, D.C. 20549.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1162

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

Respondent's brief in opposition contends that the question presented is not important because the kind of Commission action held reviewable by the court of appeals occurs only a few times each year. The argument erroneously assumes (1) that the decision of the court of appeals sanctions judicial review only of Commission rulings relating to stockholder proposals, and only rulings by the agency itself rather than by its staff, and (2) that at most one or two appellate proceedings could arise each year in the narrow category of cases to which respondent believes the decision below applies.

1. The Commission employs the same informal procedures and provides the same informal advice in re-

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viewing all proxy matters as it does in reviewing stockholder proposals. The requirement in all instances is merely one of filing; the procedures governing such filings are no more formal for stockholder proposals than for other proxy materials. See 17 C.F.R. 202.3(a).[1] Disputes between stockholders and the company before the Commission occur not only with respect to stockholder proposals but also with respect to other proxy matters, such as contests for corporate control, conflicts involving mergers, etc. The rationale of the court of appeals' decision is equally applicable to Commission proxy rulings on all of these subjects, and it suggests that any person—company as well as stockholder—who is dissatisfied with a Commission ruling may directly challenge it in the court of appeals.

Moreover, the court's rationale suggests that direct appellate review also would be available where the Commission merely declined to review its staff's decision rather than, as in the present case, declined to

[1] There is no basis for respondent's statement (Br. 4) that the "SEC has established what it itself describes as 'formal' and mandatory procedures which are specifically designed to deal with the rare situation in which a corporate management flatly refuses to accept a shareholder proposal for inclusion in its proxy materials." Subparagraph (d) of Rule 14a–8 does not "require that the parties' position papers be filed," as the respondent asserts (Br. 5). There is no reference to "parties" or to "position papers" in the rule; when a shareholder, such as the respondent, writes to the Commission concerning a proposal, it is on a purely voluntary basis. Since there are no formal administrative proceedings in proxy matters, there is no basis for respondent's suggestion (Br. 5) that management has the "burden of proof" in a proxy proceeding before the Commission.

overrule it. The Commission is responsible for the administration of its proxy rules; whatever authority its staff has in this area necessarily exists because the agency has delegated it to the staff; and the considerations that led the court of appeals to conclude that the Commission's determination to "raise no objection" if the company followed the staff's advice constituted reviewable agency action would seem to call for the same conclusion where the Commission declined to review the staff's determination.

2. Starting with the fact that only 137 companies received proxy proposals from their shareholders in fiscal year 1969, respondent states that there was an actual deadlock between the company and its shareholders in less than ten instances; and it concludes that since only those cases in which the Commission acted on the matter would be reviewable, the decision below will give rise to no more than one or two appellate proceedings each year. Since the rationale of the decision below is equally applicable to all actions by either the Commission or its staff relating to proxy matters, and not just to Commission actions relating to stockholder proposals, the proper starting point is not the 137 companies that received proxy proposals from their shareholders in 1969 (which is the basis upon which respondent rests its argument) but the more than 5,300 proxy filings made annually with the Commission. Although not all of the latter will give rise to a dispute between the company and the Commission that is likely to lead to litigation, the number of potential serious disputes within the latter category is far greater than respondent suggests.

Even on respondent's own terms, however, its figures are erroneous. While only 137 companies received shareholder proxy proposals in 1969, the number of proposals submitted to those companies was significantly greater: 221 were submitted, and the companies omitted 48 of them.[2] Since each proposal had to be considered separately, the actual number of shareholder-company disputes in that year was 48 rather than 19. Furthermore, in the light of present social and political currents, the number of proposals that will be submitted in future years is likely to increase, not to decrease, and an increasing number of them are likely to involve deadlocks between the company and a shareholder.

As pointed out in the petition (p. 17), and as respondent recognizes (Br. 14, n. 15), the court of appeals cannot grant the only effective relief in such a case, namely, an injunction; the district court alone can do that.[3] A decision which poses the real likelihood of substantial appellate litigation, which will have an unsettling effect on hitherto settled administrative procedures, and which realistically is unlikely to accomplish the basic aim of the proxy rules of best aiding corporate democracy, warrants review by this Court.

* * * * *

On January 26, 1971, Dow wrote respondent that it was considering including respondent's proposal in

[2] Securities and Exchange Commission, Thirty-fifth Annual Report 47 (1969).

[3] As pointed out in the petition, the Committee has a fully adequate remedy; it can sue the company in the district court to enjoin alleged violations of the proxy rules.

the company's proxy materials for the 1971 annual meeting. A copy of that letter is attached. Dow stated that it was still of the view that it properly could omit the proposal, and that its decision to consider including it was made "as a matter of policy and without prejudice to our right at any time to claim that your proposal * * * is one which may be properly omitted."

The fact that Dow may distribute the proposal in connection with its 1971 annual meeting—or, indeed, the fact that it actually does so—does not render this case moot. *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 43; *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632–633. *Walling* is directly in point. In holding that a case involving the legality, under the Fair Labor Standards Act, of so-called "split-day contracts" was not rendered moot by the company's abandonment of the contracts during the litigation, the Court stated (p. 43): "Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. * * * Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made." The same reasoning applies to the dispute between respondent and Dow over whether the latter is required to distribute to its shareholders the Committee's proposal. Dow continues to insist that it is not required to distribute the proposal, and even if it does so this year and the proposal is defeated, Dow may reject it in future years.

Although Dow's recent action does not render the case moot,[4] it does further underline the inappropriateness of permitting direct court of appeals review of Commission proxy actions. For even if, under the remand directed by the court of appeals, the Commission were now to conclude that Dow is required to include the Committee's proposal, this would be a wholly advisory opinion that would not bind Dow. The only way Dow could be compelled to include the Committee's proposal is pursuant to an order entered by the district court in an action brought either by the Commission or by the Committee. The court of appeals' decision merely adds an unnecessary layer of appellate review that cannot definitively decide the controversy.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PHILIP A. LOOMIS, JR.,
General Counsel.

FEBRUARY 1971.

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[4] If the Court nevertheless should conclude that the case is moot, the proper disposition would be to grant the petition, vacate the judgment of the court of appeals and remand the case to that court with directions to dismiss the petition for review as moot. *Sears, Roebuck & Co.* v. *Carpet Layers*, 397 U.S. 655.

APPENDIX

THE DOW CHEMICAL COMPANY,
Midland, Michigan, January 26, 1971.

DR. ELI C. MESSINGER,
Chairman, Medical Committee for Human Rights
410 South Eighth Street
Philadelphia, Pa. 19147

DEAR DR. MESSINGER: We are in receipt of your letter of January 16 submitting a proposal on the subject of production of napalm by The Dow Chemical Company for presentation at our Annual Meeting of Stockholders to be held May 4, 1971.

For reasons stated in previous opinions of counsel, with which you were furnished prior to our 1969 and 1970 Annual Meetings, it is our opinion that your proposal may properly be omitted from the proxy materials in connection with our forthcoming Annual Meeting. We have determined, however, as a matter of policy and without prejudice to our right at any time to claim that your proposal or any similar proposal previously submitted by you is one which may be properly omitted, to consider including your proposal in the proxy materials in connection with such Annual Meeting. If the decision is to include your proposal the management will, however, recommend voting against it. Before we can make a final determination, however, we must see your statement not exceeding one hundred words in support of your pro-

posal, which should be submitted to us as promptly as possible.

Sincerely yours,

W. A. GROENING, Jr.,
General Counsel.

cc: 66 W. 87 Street
N.Y., N.Y. 10024
Herbert H. Dow

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E. ROBERT SEAVER, CLERK

No. 70-61

In the Supreme Court of the United States

OCTOBER TERM, 1971

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

ERWIN N. GRISWOLD,
Solicitor General,
DANIEL M. FRIEDMAN,
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WM. TERRY BRAY,
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RICHARD E. NATHAN,
Assistant General Counsel,
HARVEY L. PITT,
Attorney,
Securities and Exchange Commission,
Washington, D.C. 20549.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70–61

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (App. 47–80) is reported at 432 F. 2d 659.

JURISDICTION

The judgment of the court of appeals (App. 80–81) was entered on July 8, 1970, and a timely petition for rehearing and suggestion for rehearing *en banc* were denied on August 26, 1970 (App. 81–82). On November 16, 1970, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 24, 1970. The petition was filed on the latter date, and was granted on March 22, 1971 (App. 82). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The relevant provisions of the Securities Exchange Act of 1934 and the Commission's Rules thereunder are set forth in the Appendix (pp. 49–57, *infra*).

QUESTION PRESENTED

Whether a determination by the Securities and Exchange Commission "to raise no objection" if a company omits a shareholder proposal from its proxy solicitation material is a Commission "order" reviewable in the court of appeals.

STATEMENT

1. Section 14(a) of the Securities Exchange Act of 1934 ("the Act") makes it unlawful to solicit proxies with respect to the securities of certain issuers[1] "in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." To implement this provision, the Commission has promulgated proxy regulations (17 C.F.R. 240.14a–1, *et seq.*) consisting of nineteen rules and thirty-two separate items. In general, the regulations specify the content and form of proxy solicitation material and require that copies of proposed material be filed with the Commission

[1] Section 14(a) is applicable to the solicitation of any proxy or consent with respect to any security required to be registered pursuant to Section 12 of the Act, 15 U.S.C. 78*l*. Section 12 broadly requires the registration of securities listed on national securities exchanges and of any corporate issuer with total assets in excess of $1 million whose securities are held by at least 500 persons.

prior to distribution. Under Section 21(e) of the Act (15 U.S.C. 78u(e)), compliance with the proxy rules may be enforced by the Commission through a district court action for injunctive relief.

As explained in greater detail below, the Commission's staff examines all proxy materials filed and advises the proxy solicitor whether the material appears to comply with the proxy rules and, if it does not, points out the defects.[2] This examination must be made quickly, in order to enable the company to meet its deadline for distributing the material sufficiently in advance of the shareholders' meeting; it involves considerable informal discussion and negotiation between the staff and the company; and the speed with which the staff's work must be done precludes any extensive study of the material.

One of the proxy rules, Rule 14a–8, requires each company subject to the proxy regulations to include in its proxy-soliciting materials proposals that security holders entitled to vote wish to have considered at a shareholder's meeting. Subsection (c) sets forth certain circumstances in which the company may omit proposals and certain types of proposals that it may omit, including those submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes" (Rule 14a–8(c)(2)) and those involving " a matter relating to the conduct of the ordinary business operations of the issuer" (Rule 14a–8(c)(5)).

If the company agrees to include a security holder's proposal in its proxy materials, the proposal will come

[2] See 17 C.F.R. 202.3(a), *infra*, pp. 56–57.

to the Commission's attention when the proxy statement, including the proposals, is filed with the Commission in preliminary form before being sent to shareholders. See Rule 14a–6, 17 CFR 240.14a–6, and 17 CFR 202.3(a). On the other hand, if the company "asserts that a proposal * * * may properly be omitted" from its proxy solicitation materials, it is required to notify the security holder who submitted it and to file with the Commission a copy of the proposal and a statement of the reasons why the corporate management "deems such omission to be proper." See Rule 14a–8(d), 17 CFR 240.14a–8(d).

2. Early in 1969, the respondent Medical Committee for Human Rights ("the Committee"), a shareholder in Dow Chemical Company ("Dow"), requested Dow to submit to its shareholders in its proxy solicitation material for the 1969 annual meeting a resolution requesting that the company's charter be amended to prohibit the company from manufacturing napalm.[3] Dow decided to omit the proposal "[f]or the reasons set forth in Rule 14a–8(c)(2) and (5)" (App. 14–15). In accordance with Rule 14a–8(d), Dow notified both the Committee and the Commission of its decision, setting forth its reasons and including a "supporting opinion" of its general counsel (App. 12–15).

[3] The Committee made a similar request in 1968 (App. 7–9), but Dow received it too late for inclusion in the 1968 proxy statement (App. 9). The Committee in 1968 proposed a resolution requesting a charter amendment restricting Dow's sale of napalm (App. 8), but the proposal finally submitted for 1969 was modified to request an amendment barring the company from making napalm (App. 17–18).

The Committee then modified its proposal to meet "certain of the objections" raised by Dow, and asked Dow to include the modified proposal in its proxy material (App. 16–18). The Committee requested the Commission's staff to review the matter if Dow should decide to omit the modified proposal and for oral argument before the Commission if the staff should raise no objection to a Dow decision to omit (App. 18). Dow again informed the Committee and the Commission that it would not include the proposal (App. 19).

On February 18, 1969, the Commission's staff informed the Committee and Dow that it would "not recommend any action to the Commission if * * * [the Committee's] proposal is omitted from the [Company's] proxy material" (App. 20–21).[4] The Committee's counsel then sent the Commission a letter renewing its request that the Commission review the staff's position and for the first time giving reasons why Dow should include the Committee's proposal in its proxy material (App. 23–31).

On March 24, 1969, the Commission, as reflected in its minute book, without elaboration, "* * * determined to raise no objection to the omission from the management's proxy statement of certain resolutions proposed by the Medical Committee for Human Rights" (App. 44).[5] The Committee was advised of

[4] In its letter to Dow, the staff indicated that its unwillingness to recommend action was predicated on the "* * * reasons stated in * * * [Dow's] letter and the accompanying opinion of counsel * * *" (App. 21).

[5] The Commission also denied the Committee's request for oral argument (App. 44).

the Commission's determination by telephone the same day (App. 46) and by letter on April 2, 1969 (App. 42–43).

3. On May 29, 1969, the Committee filed a petition for review of the Commission's determination of March 24 in the United States Court of Appeals for the District of Columbia Circuit (App. 4). The Commission moved to dismiss the petition on the ground that nothing it had done was judicially reviewable (App. 44–45). The court denied that motion "without prejudice to renewal thereof in the briefs and at the argument on the merits" (App. 45).

After briefing and argument,[6] the court of appeals held that "the Commission's action in the present case is reviewable" and remanded the case to the Commission "for further administrative proceedings" (App. 47). It ruled that "the relevant jurisdictional statute," Section 25(a) of the Act, authorized such review (App. 53).

The court stated that the Commission's action "operates with sufficient particularity and finality to warrant judicial review" (App. 58), and that the proxy procedures provided in Rule 14a–8 "are possessed of sufficient 'adversariness' and 'formality' to render [the

[6] In its March 24 determination to raise no objection, the Commission had expressed no view on the legal issues raised by the Committee (App. 44). As a result, the Commission limited its argument in the court of appeals to the question whether the agency's action was reviewable and did not discuss the application or interpretation of the exemptive provisions of Rule 14a–8.

Commission's] final proxy determinations amenable to judicial review" (App. 62). The court recognized that "the Medical Committee could obtain a judicial determination of the legitimacy of its claim through a private action against Dow Chemical in the district court" (App. 64), citing *J. I. Case Co.* v. *Borak,* 377 U.S. 426, but concluded that "[d]irect [court of appeals] judicial review of the Commission proxy decisions is unquestionably the most logical and efficient means of achieving [the Congressional] objective" in Section 14(a) of the Act of protecting corporate investors (App. 65).

After an extensive discussion of the standards governing exclusion of security holder proposals and the reasons Dow gave for excluding the Committee's proposal (App. 70–79), the court stated (App. 80):

> In light of these considerations, therefore, the cause must be remanded to the Commission so that it may reconsider petitioner's claim within the proper limits of its discretionary authority as set forth above, and so that "the basis for [its] decision [may] appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review." [Brackets in original; footnote omitted.]

SUMMARY OF ARGUMENT

The review of proxy solicitation material by the Securities and Exchange Commission is informal and cursory, designed expeditiously to assist persons to comply with the Commission's proxy rules. The Com-

mission makes no attempt definitively to determine whether particular material complies with the rules; its staff merely advises the proxy solicitor whether the material appears to do so and, if not, what changes are necessary to remedy the deficiencies. The Commission cannot compel compliance with the rules through administrative proceedings; its only method of enforcement is to institute a suit for injunctive relief in the district court. Although proxy solicitors need not follow the advice of the Commission or its staff, they generally do so, since their primary objective is to insure prompt distribution of the proxy material with a measure of assurance that the Commission will not institute an injunctive action.

Section 25(a) of the Securities Exchange Act of 1934, which the court of appeals recognized is "the relevant jurisdictional statute" (App. 53), permits review only of "an order issued by the Commission in a proceeding" under the Act. The statute permits review only of "orders of a definitive character dealing with the merits" (*Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384). The Commission's advice to Dow that it would raise no objection should Dow omit the Committee's proposal from its proxy soliciting material is not such an "order." The Commission did not definitively determine any rights of the Committee or definitively adjudicate the controversy between the Committee and Dow.

The Commission did no more than advise Dow that the agency would not institute an enforcement suit. Section 21(c) of the Act explicitly commits that decision to the discretion of the Commission. That discretionary determination is not judicially reviewable, even though it is claimed that in so deciding the agency acted upon erroneous legal premises. *Schilling* v. *Rogers*, 363 U.S. 666.

The Committee can at any time bring an action in the district court to enjoin Dow from violating the proxy rules. *J. I. Case Co.* v. *Borak*, 377 U.S. 426; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375. It could do so without first going to the Commission, and the Commission's determination to take no action against Dow would be legally irrelevant in such a suit. Moreover, only in such a district court action could the Committee obtain the full relief it is seeking through this litigation, *i.e.*, compelling Dow to distribute the proposal; the court of appeals recognized that it could not order Dow to do that.

Appellate review of the Commission's determination to take no action, moreover, would serve no meaningful purpose. It could be of little help to the complaining security holder, since the decision could not require the company to do anything. On the other hand, it would tend to stultify the Commission's informal procedures that over the years have resulted in effective administration of its proxy rules for the benefit of security holders.

ARGUMENT

SECTION 25(a) OF THE SECURITIES EXCHANGE ACT OF 1934 DOES NOT AUTHORIZE JUDICIAL REVIEW OF A DETERMINATION BY THE SECURITIES AND EXCHANGE COMMISSION TO RAISE NO OBJECTION SHOULD A CORPORATION OMIT A SECURITY HOLDER'S PROPOSAL FROM ITS PROXY SOLICITATION MATERIAL

The court of appeals held that the Commission's determination "to raise no objection" if Dow should omit the Committee's proposal from the company's proxy solicitation material was an agency "order" subject to judicial review under Section 25(a) of the Securities Exchange Act of 1934. The correctness of that holding depends upon the nature of the agency determination. If, as we contend, the Commission's action involved no more than an informal decision that there was no occasion for the agency to act if Dow were not to include the Committee's material, and if that decision has no legal effect upon the Committee's rights, then under settled principles the Commission determination is not judicially reviewable.

Accordingly, we shall first explain the precise nature of Commission review of proxy solicitation material. This requires consideration of the development of the agency's proxy review procedures—a practice which evolved from the Commission's review of securities registration statements under the Securities Act of 1933—and a careful analysis of the precise effects of a Commission determination not to object to a company's refusal to include a security holder's proposal in its proxy solicitation material.

To place the discussion in proper perspective, certain basic facts relating to Commission review of proxy materials must be borne in mind. The Commission has no authority to take any administrative action to enforce the proxy rules; its sole remedy with respect to a violation is to institute a suit for injunctive relief against the company in the district court. A security holder himself may institute such a suit at any time, whether or not he has complained to the Commission.

Since the agency promulgated the first proxy rules thirty-five years ago, it has followed a practice of informally reviewing proxy materials to give the proxy solicitor its prompt judgment on whether distribution of the material would be in conformity with the rules. Because of the large number of proxies filed each year and the short time the staff has to consider them, the review is speedy and necessarily cannot involve the kind of in-depth study that typically precedes an agency's adjudicative or dispositive decision. The process is one of informal consultation and negotiation between the staff and the solicitor. The Commission's review of proxy materials thus is purely advisory, not adjudicatory; the Commission does not attempt definitively to determine whether particular material complies with the rules or to decide disputes among security holders or between security holders and management relating to the rules.

Since companies ordinarily are more interested in distributing the materials promptly than in contesting legal issues, the Commission rarely finds it necessary to resort to enforcement litigation to correct

whatever apparent deficiencies its examination of their material discloses. When the Commission advises a company, as it did in this case, that it will not object if the filed materials are distributed, this is another way of telling the company that the agency will not institute an enforcement suit. That decision, however, does not involve any determination of any dispute respecting the proxy materials; the Commission's decision not to object if Dow did not distribute the Committee's proposal did not bind the Commission, the Committee or Dow in any subsequent litigation in which any of them might be involved.

A. COMMISSION REVIEW OF PROXY SOLICITATION MATERIAL DOES NOT RESULT IN A DEFINITIVE DETERMINATION WHETHER THE MATERIAL COMPLIES WITH THE PROXY RULES.

1. Since the earliest days of its existence, the Commission has utilized informal administrative action rather than formal administrative proceedings in situations where the need for speed and the character of the agency's function normally made such formal proceedings inappropriate.[7] The first of the federal

[7] The Commission's rendering of informal advice through such procedures has been commended as an "excellent practice in administrative procedure." Commission on Organization of the Executive Branch of the Government, *Task Force Report on Legal Services and Procedures* (1955), p. 189. See also, Report of the Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 39–40 (1941); Aranow & Einhorn, *Proxy Contests for Corporate Control* 294–297 (2d ed. 1968); III Loss, *Securities Regulation* 1894–1896 (2d ed. 1961), VI Loss, *id.* 4023–4026 (Supp. 1969); 1 Davis, *Administrative Law Treatise* Section 4.09 (1958); Cary, *Administrative Agencies and the*

securities laws, the Securities Act of 1933, requires that a registration statement covering securities to be publicly sold must be filed with the Commission 20 days before its effective date. 15 U.S.C. 77h(a). If the Commission concludes that a statement is false or misleading, it can initiate formal administrative proceedings in which, after notice and hearing, it can deny or revoke the effectiveness of the statement. 15 U.S.C. 77h(b) and (d).

The Commission quickly realized, however, that it would be impossible for it as a practical matter to take such formal action in any substantial number of cases. Report of the Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 40 (1941).[8] As a result there evolved the informal deficiency letter or letter of comment, in which the staff indicated to the issuer its views as to any deficiencies in the statement and gave the issuer the opportunity to correct them before the statement became effective. This procedure aided compliance with the disclosure requirements of the Act without the need for protracted formal administrative proceedings, the very

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Securities and Exchange Commission, 29 Law & Contemp. Prob. 653, 660 (1964); Cohen & Rabin, *Broker-Dealer Selling Practice Standards: The Importance of Administrative Adjudication in Their Development*, 29 Law & Contemp. Prob. 691, 692 (1964); Von Mehren & McCarroll, *The Proxy Rules: A Case Study in the Administrative Process*, 29 Law & Contemp. Prob. 728, 748 (1964).

[8] This report was a landmark study of administrative procedure; we cite it hereafter as *Report*.

initiation of which could cause serious problems in selling the securities.[9]

Unlike the Securities Act of 1933, which requires the filing of registration statements prior to their effective date and specifies in considerable detail the information they must contain (15 U.S.C. 77g), the Securities Exchange Act of 1934 merely prohibits the solicitation of proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors" (Section 14(a), 15 U.S.C. 78n (a)). Congress thus left it to the Commission to prescribe not only the substantive standards governing the solicitation of proxies, but also the procedures to be followed. That Act, however, differs from the Securities Act of 1933, in that Congress made no provision for the Commission to initiate formal administrative procedures to prevent violations of the proxy rules;[10]

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[9] *Report*, 40: "[T]he securities must be sold upon prospectuses which command public confidence. * * * [T]he mere institution of proceedings which criticize the completeness or accuracy of a statement is, as a practical matter, a serious and probably fatal blow to the proposed offering." In recognition of this fact, the Commission determined that it would initiate formal administrative proceedings only if it appeared that there was a deliberate attempt to mislead investors. Cf. 17 C.F.R. 202.3(a). See generally, Blair-Smith, *Forms of Administrative Interpretation Under the Securities Laws*, 26 Iowa L. Rev. 241, 249–250 (1941); Johnson & Jackson, *The Securities and Exchange Commission: Its Organization and Functions Under the Securities Act of 1933*, 4 Law & Contemp. Prob. 3, 10–11 (1937).

[10] Compare Section 12(e) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79*l*(e), which "consistently with the regulatory philosophy of the Holding Company Act" (II Loss, *Securities Regulation* 866 (2d ed., 1961)), makes unlawful the solicitation of "any proxy" * * * regarding any security of a registered holding company or a subsidiary company thereof in contra-

the only sanction available to the agency to prohibit a violation is to initiate a district court suit for an injunction, under Section 21(e) of the Act, 15 U.S.C. 78u(e).[11]

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vention of such rules and regulations *or orders* as the Commission deems necessary or appropriate * * * for the protection of investors or consumers or to prevent the circumvention of the provisions of [that Act] or the rules, regulations, *or orders* thereunder" (emphasis supplied). Rule 62 under that Act, 17 C.F.R. 250.62, implements this provision by establishing formal administrative procedures with respect to consideration of certain types of soliciting material, which lead to a formal Commission order.

[11] See II Loss, *Securities Regulation* 931 (2d ed., 1961). Former Commission Chairman Armstrong summarized the agency's power here in *Hearings before a Subcommittee of the Senate Committee on Banking and Currency on S. 879, Stock Market Study (Corporate Proxy Contests)*, 84th Cong., 1st Sess. Pt. 3 (1956) (hereafter cited as *1956 Hearings*), pp. 1540–1542 as follows:

> * * * [O]ur only legal remedy [for a proxy rule violation] is to seek an injunction in the Federal court * * *.
>
> * * * * *
>
> The Commission has no authority under the statute or its rules, by its own administrative action, to compel correction of false or misleading proxy material, to prevent solicitations in disregard of the rules, to prevent the use of false or misleading proxy material, to compel or prevent or delay the holding of a meeting or to compel or to prevent the voting of proxies even though they may have been solicited and secured on the basis of fraud.

See also Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties*, 31 N.Y.U. L. Rev. 875, 876, 886–887, and n. 50 (1956); Armstrong, *The SEC and Proxy Contests*, 182 Comm. & Fin. Chron. 875, 888 (1955); Loss, *The SEC Proxy Rules in the Courts*, 73 Harv. L. Rev. 1041, 1043–1044 (1960); *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 1493 (SEC Proxy Rules)*, 78th Cong., 1st Sess. 81–82 (1943) (hereafter cited as *1943 Hearings*) (Statement of Commission Chairman Purcell).

The Commission's first proxy rules, adopted in 1935, did not require that the materials be filed with the agency before distribution; they merely specified certain information that had to be disclosed. Securities Exchange Act Release No. 378 (September 24, 1935) (Class A). This arrangement proved unsatisfactory, however, because there were a number of instances in which the Commission, upon examining the material that had been distributed, concluded that it had not complied with the rules and requested the company to make a supplemental solicitation.[12] In 1938 the Commission advised persons "desiring informal opinions or suggestions" in connection with proxy material to present the request "as far in advance of the solicitation as practicable." Securities Exchange Act Release No. 1823 (August 11, 1938), p. 2. The procedure did not materially reduce the number of proxy solicitations in violation of the rules, and in 1940 the Commission amended its rules to require, as they have provided ever since, that proxy materials be filed with the agency for its inspection prior to solicitation. Securities Exchange Act Release No. 2376 (January 12, 1940), p. 2. See *1943 Hearings, supra*, n. 11, pp. 15–16.

The prefiling requirement enables the agency to examine and comment upon the proposed proxy material before distribution to security holders. In accordance with the agency's practice (17 C.F.R. 202.3(a), 202.1(d)), the examination ordinarily is made by the staff, with participation by the Commission itself only

[12] *1943 Hearings* at p. 15 (statement of Commission Chairman Purcell).

in those relatively rare cases where unusual problems exist and the staff or an interested person requests it. The rules admonish that final printing of the proposed material should be deferred "until the comments of the Commission's staff have been received and considered" (Note, Rule 14a-6(f), 17 CFR 240.14a-6(f)). The development of this informal review to encompass all proxy filings has been described as "[p]robably the most important development in the field of proxy regulation * * *."[13]

The Commission's rules with respect to security holder proposals underwent a similar development reflecting the Commission's practical experience in dealing with them. In 1938 the Commission took the view that a proxy statement was misleading if management did not indicate any security holder proposals which it knew would be presented at the meeting and against which it intended to vote the proxy it was soliciting. *1943 Hearings,* pp. 16, 118, 169, 170;[14] Securities Exchange Act Release No. 1823 (August 11, 1938), p. 14. It provided a requirement for such disclosure

[13] Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties*, 31 N.Y.U. L. Rev. 875, 876 (1956).

[14] As Commission Chairman Purcell explained at the *1943 Hearings* (p. 170):

> The proxy statement purports to tell the stockholders everything that is going to be taken up at the meeting. The management knew these proposals were going to be taken up at the meeting. It knew that it intended to oppose them. Any statement which did not include those proposals and the position of the management was obviously misleading, because the soliciting material purported to tell the stockholders everything that is going to be taken up at a meeting that the management knew about.

in an amendment of the rules in 1940, which also required that the proxy itself provide a space for the shareholder to vote on the proposal. Securities Exchange Act Release No. 2376 (January 12, 1940), p. 3. Two years later the rules were amended to require the company to include proposals of which it had been given reasonable notice by the security holder.[15] A 1947 amendment required the company to notify the Commission when it filed its preliminary material of any security holder proposality intended to omit;[16] in 1954 a further amendment required the company to give such notice to

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[15] Securities Exchange Act Release No. 3347 (December 18, 1942). The 1942 amendment also required the company to distribute a 100-word statement submitted by the shareholder in support of his proposal. As Chairman Purcell explained (*1943 Hearings*, p. 112):

> * * * the company will then present them [the proposals], or usually does, with their preliminary proxy material * * *. [W]e take the facts which are submitted to us either by the company or which we can get anywhere else, and if it appears right from the face of the statements, in the light of the facts that we know that the [100-word] statement is false or misleading, we will tell the company they need not carry it.

On the other hand, he pointed out:

> If we * * * believed that * * * the statement [in support of the shareholder proposal] was not false or libelous, we would advise the management that in our opinion it was necessary for them to include the 100-word statement. Under those circumstances, if the management insisted on sending out its material without the 100-word statement, we would sue for an injunction restraining them from sending out their material without including the 100-word statement. In such a proceeding the court would, of course, determine definitively whether we were correct in our position.

Id. at 118.

[16] 12 Fed. Reg. 8768 (Dec. 24, 1947) at p. 8770.

the Commission before it filed its materials.[17] Amendments in 1948, 1952 and 1954 specified circumstances in which the company was not required to include security holder proposals.[18]

2. Thus, over the years the information required to be included in proxy soliciation materials, the time for filing such materials with the Commission and company obligations with respect to security holder proposals underwent significant development and improvement. But two interrelated aspects of the Commission's review of proxy materials, which are critical to the present case, remained the same. (a) The Commission's sole purpose in conducting such review has been to insure full disclosure to public investors. (b) The Commission has never purported or attempted defin-

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[17] The Commission explained this as follows (Securities Exchange Act Release No. 4979 (January 6, 1954) at p. 2):

> So that the Commission will have more time to consider the problems involved in such cases and the security holder will have an opportunity to consider the management's position and take such action as may be appropriate, the amended rule provides that a copy of the proposal and a statement of reasons for its omission must be furnished to the Commission and the security holder not later than 20 days prior to the date of filing the management's preliminary proxy material.

[18] See Securities Exchange Act Release No. 4114 (July 6, 1948), p. 2 (proposed amendment), and Securities Exchange Act Release No. 4185 (November 5, 1948) (amendment as adopted); Securities Exchange Act Release No. 4775 (December 11, 1952), pp. 7–9; and Securities Exchange Act Release No. 4979 (January 6, 1954), pp. 4–5.

itively to determine whether particular proxy material complied with the rules.[19]

a. The Commission, of course, has no interest in the merits of particular security holder proposals; the right of security holders to present proposals at

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[19] The court below predicated its holding (App. 61–62) that the Commission's informal review of security holder proposals constituted a formal adjudicatory procedure in part on the following language contained in the release adopting the 1954 amendment to the security holder proposal rule (providing for advance notice to the Commission of management's intent to omit a security holder proposal):

> The rule places the burden of proof upon the management to show that a particular security holder's proposal is not a proper one for inclusion in management's proxy material.

Securities Exchange Act Release No. 4797 (January 6, 1954), p. 2.

But the 1954 amendment itself did not purport to set up adjudicatory procedures. The language in the release is consistent with the burden on any proxy solicitor to show the staff that its materials comply with the applicable rules. As Commission Chairman Armstrong testified two years later:

> The accuracy of the statements made and the truth and adequacy of proxy material are the responsibility of the persons soliciting proxies. It is not the Commission's. At the administrative level, at least, the burden is on the user to establish that his facts, arguments, and charges are true and not misleading. It is not and cannot be the Commission's function to prove the truth, accuracy, and fairness of every piece of proxy material filed with us.

1956 Hearings, p. 1546.

Indeed, the Commission's contemporaneous interpretation of its rules and contemporaneous comments were in accord that the Commission did not intend either to expand security holder rights or to create any procedures whereby security holders could vindicate, through the Commission, their limited right to have proposals included in the proxy statement. See, *e.g.*, Bayne, Caplin, Emerson & Latcham, *Proxy Regulation and the Rule-Making*

the meeting turns upon state law.[20] The Commission's sole concern is to insure that the public investors receive full and accurate information about all security holder proposals that are to or should be submitted to them for their action. If the company fails to distribute a security holder proposal that it should have included, the other security holders have not only been denied necessary information and the opportunity to vote for a proposal they favor, but unwittingly may have given a proxy that management would vote against the proposal.

Process: The 1954 Amendments, 40 Va. L. Rev. 387, 388 (1954); Letter of Byron D. Woodside, Director of the Commission's Division of Corporation Finance ('52–'56 Transfer Binder), CCH Fed. Sec. L. Rep. ¶ 90,659 (Mar. 4, 1954) at p. 92,003; Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission & Private Parties*, 31 N.Y.U. L. Rev. 875, 886–887 and n. 59 (1956).

[20] As former Chairman Demmler stated:

> The stuff of these controversies [under the Securities and Exchange Commission's proxy rules] is the sort of thing which courts have been adjudicating since corporate elections began. The injury to the complainant, real or fancied, may, and usually does, include substantive matters unrelated to the proxy rule violation.

Demmler, *Private Suits Based on Violation of the Proxy Rules*, 20 U. Pitt. L. Rev. 587, 591 (1959), cited in Loss, *The SEC Proxy Rules and State Law*, 73 Harv. L. Rev. 1249 (1960). Accord, *1943 Hearings*, pp. 133–134, 172, 180, 181.

See, also, *1943 Hearings*, pp. 99–100 (Commission Chairman Purcell):

> Of course, the rules govern the solicitation of the proxies. I do not want to appear to hammer this, but it is a fact they govern the solicitation of proxies and not what happened at the meeting, and it is rather difficult to give you good answers to questions concerning actions which do not in the main concern our Commission * * *.

b. Staff review of proxy solicitation materials is concentrated in the two or three months in the spring when most corporate meetings are held. In the 1970 fiscal year the agency reviewed more than 5500 proxy statements.[21] With its limited staff and the need for rapid examination, the Commission necessarily cannot do more in each case than make a quick analysis of the material submitted that perforce lacks the kind of in depth study that would be essential to a definitive determination whether a particular filing complies with the rules. Indeed, it was the impossibility generally of making definitive determinations in formal proceedings with respect to registration statements that led the Commission to initiate the informal review of those statements that is now the keystone of Commission enforcement of the registration provisions of the Securities Act of 1933. See *supra,* p. 13.

What the Commission staff does in reviewing proxy materials is to make a prompt judgment, based upon the materials before it, whether the solicitation seems to comply with the rules. The staff then explains to the company the respects in which it believes that the materials are deficient, in an attempt to persuade the company to change them to conform with the rules, and thereby to provide more accurate information to public investors.[22] If, on the other hand, the staff con-

[21] Securities and Exchange Commission, *Thirty-Sixth Annual Report*, p. 46.

[22] Staff review also "make[s] it possible for the staff to advise the Commission whether it appears that the person

cludes that the proxy materials as filed appear to satisfy the rules, it so informs the company. The latter thereby obtains some measure of assurance that, if it distributes the materials as filed, the Commission will not seek to enjoin the solicitation by filing an injunction suit. That occurred in this case on the staff level, when the staff informed Dow that it would "not recommend any action to the Commission" if the company omitted the Committee's proposal from its materials (App. 20–21).

Similarly when the Commission itself decided "to raise no objection" if Dow omitted the Committee's proposal, it merely declined to interfere with the staff's conclusion or to institute an enforcement suit. The Commission's decision might have resulted from one or more considerations. For example, the agency might have concluded that, without a detailed study of the case, it could not firmly conclude that the rules required Dow to include the Committee's proposal. Or it might have decided that, whatever might be the merits of the case, the issue did not warrant initiating an enforcement suit.

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soliciting is or is not complying with the [proxy] requirements, and in the event of noncompliance, to permit an appropriate recommendation as to what action to enforce the rules the Commission might wish to pursue." *Hearings before a Subcommittee of the Senate Committee on Banking and Currency on SEC Enforcement Problems*, 85th Cong., 1st Sess. Pt. 1 (1957), pp. 17–18 (testimony of Commission Chairman Armstrong).

It is, of course, impossible to know the precise basis of the Commission's decision, because the Commission gave no reason for it. But the Commission was not required to give any reasons, since its action here consisted of no more than informal advice to the company as to what course the agency would follow if Dow should continue to refuse to include the Committee's proposal in its proxy materials.

In sum, neither the staff nor the Commission makes any definitive determination of whether particular proxy materials comply with the rules when it advises the company as to its views on compliance. The proxy rules themselves explicitly so state. Rule 14a–9(b), 17 C.F.R. 240.14a–9(b), provides:

> The fact that * * * proxy * * * soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. * * *

See also, Section 26 of the Act, 15 U.S.C. 78z.[23]

In 1956 the Chairman of the Commission pointed out to Congress that over the years there had de-

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[23] That section provides:

> No action or failure to act by the Commission * * *

veloped a misconception of what the agency does in reviewing proxy materials—there was "the popular notion that we 'approve' * * * or 'clear' or 'permit' the use of proxy material."

> These characterizations of our action or nonaction are not accurate. What actually is involved is that the staff of the Commission concludes on the basis of the submitted proxy material and any other information available to the Commission that, on its face, there has not been a failure, on the part of the person who has submitted the material, to comply with the standards of the proxy regulations.[24]

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in the administration of this chapter [the Act] shall be construed to mean that * * * [the Commission] has in any way passed upon the merits of, or given approval to, any security or any transaction or transactions therein; nor shall such action or failure to act with regard to any statement or report filed with or examined by such authority pursuant to this chapter or rules and regulations thereunder, be deemed a finding by such authority that such statement or report is true and accurate on its face or that it is not false or misleading. * * *

[24] *1956 Hearings*, pp. 1545–1546 (testimony of Chairman Armstrong).

See also Dean, *Twenty-Five Years of Federal Securities Regulation by the Securities and Exchange Commission*, 59 Colum. L. Rev. 697, 737 (1959):

> Under the Exchange Act, the SEC has no duty to verify the material in proxy statements. Indeed, the SEC has found over the years that in practice it is not able to

The court of appeals was thus in error in suggesting that the Commission's decision "to raise no objection" if Dow omitted the Committee's material was "an adverse Commission determination" on the merits (App. 57; see App. 68, 71) and in stating that the agency "adopted" the staff's determination reflecting the views of Dow's counsel (App. 76).

3. One of the factors upon which the court of appeals relied in holding the Commission's determination reviewable was its belief that Commission review of security holder proposals differs from Commission informal review of other proxy matters—and, indeed, from Commission informal review generally—in that, in dealing with security holder proposals, opposing points of view frequently are presented to the agency (App. 59–60). But if, as we have argued, the Commission decision here "to take no action" involves no determination of the merits of the dispute between Dow and the Committee, the character of that decision was not altered because it was made after considering the views of both parties to the dispute. In any event, the court was mistaken in assuming that conflicting viewpoints are not presented to the Commission in its informal review of other subjects.

In contests for corporate control, "[o]ne contestant may complain to the Commission that the other's

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verify the facts in proxy statements, no matter how carefully its staff goes over them.

Particularly in an election or merger contest, * * * the fast changing barrage and counter-barrage in the limited period between the calling and holding of a stockholders' meeting does not lend itself to administrative hearings and findings of fact.

material is false or misleading and seek the Commission's aid to secure retraction or correction administratively, or, and this is quite common, petition the Commission to commence legal action against the other side."[25] Even apart from proxy contests, the Commission frequently receives complaints from security holders after proxy material has been disseminated that it is inaccurate[26] and sometimes is requested to ask the company to send out corrective material. Similarly, there may be opposing points of view when the staff issues so-called "no action" letters to persons asking whether securities not registered under the Securities Act of 1933 can be sold, in which the staff advises the seller it will not recommend enforcement action to the Commission if the proposed transaction is effected. In such situations the issuer, upon learning of the request for a no-action letter by a stockholder, may be concerned that the distribution will in fact turn out to be a public offering that would subject the issuer to liability under the statute if the securities were not registered and urge the Commission not to issue the letter.[27]

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[25] *1956 Hearings*, p. 1552 (testimony of Chairman Armstrong). See also Armstrong, *More About the SEC's Proxy Rules*, 181 Comm. & Fin. Chron. 2645, 2665 (1955); Dean, *Twenty-Five Years of Federal Securities Regulation by the Securities and Exchange Commission*, 59 Columbia L. Rev. 697, 737 (1959).

[26] See, *e.g.*, *Gerstle* v. *Gamble-Skogmo, Inc.*, 298 F. Supp. 66 (E.D. N.Y.).

[27] Cf. *Kanton* v. *U.S. Plastics, Inc.*, 248 F. Supp. 353, 357 (D. N.J.).

B. THE COMMISSION'S DETERMINATION TO TAKE NO ACTION IF DOW SHOULD NOT INCLUDE THE COMMITTEE'S PROPOSAL IN ITS PROXY MATERIALS IS NOT A REVIEWABLE ORDER UNDER SECTION 25(a) OF THE ACT

1. Section 25(a) of the 1934 Act, which the court of appeals recognized is "the relevant jurisdictional statute" (App. 53), provides: "Any person aggrieved by an order issued by the Commission in a proceeding under this chapter [the Act] to which such person is a party may obtain a review of such order" in the court of appeals.

Within the meaning of that Section, the informal procedures by which the Commission reviews proxy material to enable it to advise the company whether it complies with the Act is not "a proceeding under [the Act]"; the Commission's decision "to raise no objection" is not "an order issued by the Commission." The statute covers only orders that definitively determine the rights and obligations of parties. The Commission's action in this case did not have this consequence.

The kind of agency action that Section 25(a) makes reviewable ordinarily is taken after formal administrative proceedings.[28] The statute was directed toward such orders, and contemplates review of essentially "judicial action" by the Commission. See *American*

[28] The Committee never suggested that the procedures provided by the Commission's rules for formal adjudication (see 17 C.F.R. 201.1 *et seq.*) applied to the agency's review of Dow's proxy materials.

Sumatra Tobacco Corp. v. *Securities and Exchange Commission,* 93 F. 2d 236, 239 (C.A.D.C.). Thus, Section 25(a) provides for the filing of the administrative record with the court of appeals, makes the Commission's findings "as to the facts" conclusive if supported by substantial evidence, and permits the court to remand the case to the agency to receive "additional evidence" and make further findings. In dealing with a substantially identical provision for judicial review in *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U.S. 375, this Court stated (p. 384):

> * * * The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

Although, as the court of appeals pointed out (App. 58–59), the fact that the agency acted without a formal evidentiary hearing no longer makes its action non-reviewable, review still is available only for "orders of a definitive character dealing with the merits" (*Metropolitan Edison, supra*).

In the present case, as we have discussed in Part A, above, the Commission's decision to take no action was not a "definitive" determination "dealing with the merits" of the controversy between Dow and the Committee. As developed below, the Committee or Dow could disregard it and take whatever action it deemed appropriate. The Committee could immediately have

filed suit in the district court to compel Dow to include its proposal in the company's materials; in such a suit, the Commission's determination would be legally irrelevant. See *infra*, pp. 33–34. Indeed, the Commission itself was not bound by that determination, since it could still bring suit against Dow should it appear to the agency that it was violating the proxy rules.[29]

The Commission's action in the present case is thus covered by this Court's description in *United States* v. *Los Angeles R.R. Co.*, 273 U.S. 299, 309–310, 311, of action of the Interstate Commerce Commission if held nonreviewable.

> * * * The so-called order * * * is one which does not command the * * * [company] to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the * * * [company] to any liability, civil or criminal; which does not change the * * * [company's] existing or future status or condition; which does not determine any right or obligation. * * * [I]t is at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the matters now complained of will be involved or in which the errors alleged will be of legal significance.

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[29] See, *e.g.*, *Securities and Exchange Commission* v. *Culpepper*, 270 F. 2d 241, 248–249 (C.A. 2); *Securities and Exchange Commission* v. *Morgan, Lewis & Bockius*, 209 F. 2d 44, 49 (C.A. 3); *cf. United States* v. *City and County of San Francisco*, 310 U.S. 16, 32.

Rochester Telephone Corp. v. *United States*, 307 U.S. 125, on which the court of appeals relied (App. 57–58), does not support reviewability. The Court there held that agency action having an immediate legal impact was not immune from review merely because it was embodied in a "negative order" by which the agency declined to act. In so ruling, however, the Court, citing the *Los Angeles* case, recognized that even agency action that "may have the effect of forbidding or compelling conduct on the part of the person seeking to review it" is not reviewable if the agency action would have such impact "only if some further action is taken by the Commission" (pp. 129, 130–131). In the present case, the fact that the Commission's determination was negative in form does not bar review. Review is barred because the determination did not forbid or compel any conduct and did not definitively decide anything with respect to the controversy between the Committee and Dow; and because it would not have that effect even if "some further action [were] taken by the Commission."

2. The court below concluded that the Committee was "aggrieved" by the agency's action because it had been "forced to undergo a two-stage administrative proceeding, compelled by the risk that failure to do so would preclude any judicial relief by virtue of the exhaustion doctrine" (App. 57), and because the court presumed that the Committee would have the burden of overcoming the agency's decision and would not have the benefit of its assistance in any

subsequent private action the Committee might bring (App. 57).

The exhaustion of administrative remedies doctrine has no application to the proxy review process. This is particularly so in so far as the proponent of a security holder proposal is concerned, since he is not a participant in the review process. The Commission's rules are directed only to the company, as a proxy solicitor, with respect to both the content of the proxy material and the filing of that material (including security holder proposals) with the Commission.[30] A security holder has neither the right to be heard before the Commission with respect to the proxy material, nor the duty to inform the agency concerning his views thereon.[31]

Nor does the Commission's action in any way foreclose the security holder's rights. Regardless of the agency's determination, the security holder still has a well established private remedy—he can initiate his own action in the district court to compel the company to include his proposal. *J. I. Case Co.* v. *Borak*, 377 U.S. 426; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375. He may do this without even complaining to or

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[30] The Commission's rules do not provide for any submission to it by security holders. In fact, the Commission rejected a suggested rule change to "require the shareholder to file with the SEC a copy of his proposal and related material at the time he submits it to management." Rayne, Caplin, Emerson & Latcham, *Proxy Regulation and the Rule-Making Process: The 1954 Amendments*, 40 Va. L. Rev. 387, 396 (1954).

[31] See Loss, *The SEC Proxy Rules in the Courts*, 73 Harv. L. Rev. 1041, 1064 (1960).

consulting the Commission.[32] Finally, the court of appeals' application of the exhaustion doctrine to the Commission's informal review of proxy filings is at odds with the principle that where an agency cannot accord persons claiming to be aggrieved the full relief they seek (as is the case here, see *infra*, p. 44), they are not required to ask the agency for help. In the circumstances of this case, the exhaustion concept is inappropriate.[34]

The court of appeals' suggestion (App. 57) that in a private action a security holder would have the "burden * * * of overcoming" the "adverse Commission determination" finds some support in cases such as *Union Pacific R. Co.* v. *Chicago & N.W.Ry. Co.*, 226 F. Supp. 400, 408 (N.D. Ill.), which have given weight to a Commission determination not to object to

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[32] In neither *Borak* nor *Mills* did this Court suggest that an application to the Commission was a prerequisite to asserting the private right of action that the Court recognized exists for violation of the proxy rules. Indeed, in neither case does the record indicate that such an application was made.

[33] See *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 205–206; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213–214; Jaffe, *Judicial Control of Administrative Action*, p. 426 (1965); 3 Davis, *Administrative Law Treatise* § 20.07 (1958); cf. *United States Alkali Ass'n.* v. *United States*, 325 U.S. 196, 210.

[34] In support of its conclusion that a security holder was required to go to the Commission before he can institute a private action, the court of appeals relied upon *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (S.D. N.Y.) (App. 57, 62). *Peck* has been criticized as based on a "misunderstanding of the Commission's informal review procedure" concerning security holder proposals. Aranow & Einhorn, *Proxy Contests for Corporate Control*, (2d ed. 1968) p. 465, n.9.

a company's refusal to include a security holder proposal in its solicitation materials. But, for the reasons set forth above, such a Commission determination is not the kind of administrative ruling to which courts should defer. Many courts have accordingly recognized that it is inappropriate to give any weight to such Commission determinations.[35] This conclusion comports with the different way in which an agency decides an issue in an adjudicatory proceeding and decides whether to institute enforcement proceedings. As Judge Learned Hand pointed out:

> * * * the position of a public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present this case for the side which he represents, and leave decision to the court * * * upon which lies the responsibility of decision. * * * Since such rulings need not have the detachment of a judicial, or semi-

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[35] See *Klastorin* v. *Roth*, 353 F. 2d 182 n. 2 (C.A. 2); *Subin* v. *Goldsmith*, 224 F. 2d 753, 774 (C.A. 2), certiorari denied, 350 U.S. 883; *Leighton* v. *One William Street Fund, Inc.* ('64–'66 Transfer Binder), CCH Fed. Sec. L. Rep. ¶ 91,561 (S.D. N.Y.); *Millimet* v. *George F. Fuller Co.* ('64–'66 Transfer Binder), CCH Fed. Sec. L. Rep. ¶ 91,570 (S.D. N.Y.), at p. 95,156. *Securities and Exchange Commission* v. *Henwood* (1961–1964 Transfer Binder), CCH Fed. Sec. L. Rep. ¶ 91,125 (S.D. Cal.), modified and affirmed *per curiam*, 298 F. 2d 641 (C.A. 9), certiorari denied, 371 U.S. 214; VI Loss, *Securities Regulation* 4023–4024 (Supp. 1969). Indeed, in both *Borak* and *Mills*, *supra*, it appears that the Commission had raised no objection to the proxies there attacked.

> judicial decision, and may properly carry a bias, it would seem that they should not be as authoritative * * *.

Fishgold v. *Sullivan Drydock & Repair Corp.*, 154 F. 2d 785, 789 (C.A. 2), affirmed, 328 U.S. 275. See also *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139–140.

That Commission review of proxy materials involves an enforcement determination rather than an adjudicatory decision was made clear by former Chairman Demmler more than ten years ago, in words that are equally pertinent today (Demmler, *Private Suits Based on Violation of the Proxy Rules*, 20 U. Pitt. L. Rev. 587, 589–590 (1959) (footnotes omitted)):

> The Securities and Exchange Commission is already an overburdened policeman. The Commission has performed its normal function as a law enforcement agency when it has reviewed proxy material to determine whether on its face there appears to have been compliance or noncompliance with the proxy rules and when it has gone to court with an injunction proceeding or made a criminal reference to the Department of Justice in case of a demonstrably serious material violation of those rules.
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> * * * Since the Commission in enforcing section 14(a) is seeking to compel compliance or to stop or punish noncompliance, its point of view is necessarily that of a policeman and prosecutor rather than that of a judge. The Commission does not pass on private rights.

3. When the Commission determined "to raise no objection" if Dow omitted the Committee's proposal,

it in effect decided not to institute an enforcement action against Dow in the district court. Such a determination is not judicially reviewable—even on the narrow ground given by the court of appeals of ascertaining whether that determination rested on erroneous legal principles.

Section 21(e) of the Act provides that, whenever it appears to the Commission that any person is violating the Act or any rule or regulation thereunder, the agency "may in its discretion bring an action in the proper district court * * * to enjoin such" conduct. In terms, the statute vests complete discretion in the Commission with respect to enforcement actions. It provides no limits or standards, but instead leaves all determinations regarding exercise of the enforcement power to the agency.

This comports with customary practice so far as law enforcement functions are concerned. The enforcement agency has complete discretion whether to institute proceedings. See *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594; *Waterhouse* v. *Mitchell,* No. 14,872, C.A. 4, decided February 16, 1971, certiorari denied, June 14, 1971, No. 1619, 1970 Term. This broad latitude is important to the proper functioning of a regulatory agency like the Commission, since investigation and litigation are an implementation of its policy-making responsibilities.[36]

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[36] If the courts were to tell the Commission which complaints to investigate or which apparent violations to litigate, the

It is not surprising, therefore, that prior to the decision below the courts had consistently held that the Commission's advisory processes and related enforcement determinations are not judicially reviewable, since they involve "informal or advisory action and not the entry of a formal order in a statutory proceeding." *Standard Fruit & Steamship Co.* v. *Midwest Stock Exchange,* 178 F. Supp. 669, 675 (N.D. Ill.). See *Leighton* v. *Securities and Exchange Commission,* C.A. 2, No. 26,458 (Nov. 3, 1960), certiorari denied, 365 U.S. 888 (1961); *Peck* v. *Securities and Exchange Commission,* C.A. 2, No. 22,289 (Apr. 7, 1952); *Cf. Dyer* v. *Securities and Exchange Commission,* 291 F. 2d 774 (C.A. 8); *Stardust, Inc.* v. *Securities and Exchange Commission,* 225 F. 2d 255 (C.A.

"courts would in effect supersede agency functioning." *Administrative Procedure Act, Legislative History,* S. Doc. No. 248, 79th Cong., 2d Sess. 275 (1946) (hereinafter cited as *Legislative History*). Congress was not insensitive to this problem in providing for judicial review under the Administrative Procedure Act, as the legislative history of that Act shows, *id.* at 38: "A final objection is that this section [the provisions of the Administrative Procedure Act, providing for judicial review] * * * would enable courts to review the failure of an agency to institute proceedings in labor cases. The point made is that, out of the numerous complaints and requests received, the responsible agency must have discretion to choose which shall be set down for proceedings. The answer, however, is that the introductory clause of [the] section [now 5 U.S.C. (Supp. V) 701(a)(2)] * * * expressly exempts 'agency action * * * by law committed to agency discretion.' " See also *id.* at 230; *cf. City of Chicago* v. *United States,* 396 U.S. 162, 165; *Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 413.

9); *Leighton* v. *Securities and Exchange Commission*, 221 F. 2d 91 (C.A. D.C.), certiorari denied, 350 U.S. 825; *Crooker* v. *Securities and Exchange Commission*, 161 F. 2d 944 (C.A. 1); *Securities and Exchange Commission* v. *Andrews*, 88 F. 2d 441 (C.A. 2); *Third Ave. Ry. Co.* v. *Securities and Exchange Commission*, 85 F. 2d 914 (C.A. 2).[37]

Thus even if the Commission had agreed with the Committee that Dow's omission of the proposal would have violated the proxy rules, the Committee could not have compelled the Commission to institute an enforcement action against Dow. As the court of appeals seemingly recognized (App. 66; but see App. 68 n. 19), that determination lies solely within the agency's discretion. The court, however, concluded

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[37] The nonreviewability of such Commission rulings on proxy matters has been generally recognized for many years. See Aranow & Einhorn, *Proxy Contests for Corporate Control*, 297 (2d ed. 1968); Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 Notre Dame Law. 13, 17 (1964); 1 Davis, *Administrative Law Treatise*, Section 4.09 (1958); III Loss, *Securities Regulation* 1926 (2d ed. 1961). Congress declined to act upon a suggestion that reviewable adjudicative procedures be adopted for this area. *1956 Hearings*, p. 1641 (testimony of Edward Aranow). The essentially-similar administrative decision of the National Labor Relations Board or its General Counsel not to initiate unfair labor practice charges under the National Labor Relations Act is likewise not judicially-reviewable. See *Anthony* v. *National Labor Relations Board*, 204 F. 2d 832, 834. (C.A. 6); *Jacobsen* v. *National Labor Relations Board*, 120 F. 2d 96, 99–100 (C.A. 3). See also *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18.

that it could review the legal theory on which the Commission exercised its discretion, on the ground that "[l]imited and partial review to examine the legal framework within which administrative discretion must be exercised is scarcely a doctrinal innovation" (App. 68).

To be sure, where a statute specifies the standards upon which an agency is to exercise its discretion, a court may consider whether the agency has followed those standards even though the ultimate exercise of discretion itself is not judicially reviewable. That was the situation in *McGrath* v. *Kristensen,* 340 U.S. 162, and *Perkins* v. *Elg,* 307 U.S. 325, upon which the court of appeals relied (App. 68–69). Where, however, the statute provides no standards that govern the exercise of discretion, and thus leaves the matter wholly within the agency's judgment, then the basis upon which the agency exercises its discretion is not reviewable even though it is alleged that the basis reflected errors of law.

That, we believe, is the teaching of *Schilling* v. *Rogers,* 363 U.S. 666. There review was sought of a decision of the Director of the Office of Alien Property that petitioner was not entitled to return of property seized under the Trading with the Enemy Act. Section 32 of that Act provided that the agency "may return" vested property to certain individuals (p. 667). It precluded return to citizens of enemy countries, but excepted from that bar the victims of

persecution. Schilling, a German national, contended he was such a victim, and therefore was entitled to return of the property. The Director ruled that Schilling was ineligible for relief under the exception. This Court held that the Director's decision was not reviewable. Rejecting petitioner's contention that "even though he might not be entitled to judicial review of an adverse administrative determination on the *merits* of his claim, he is nonetheless entitled to such review on the issue of his *eligibility*" (363 U.S. 674–675), the Court ruled that

> the permissive terms in which the § 32 return provisions are drawn (*ante,* p. 667) persuasively indicate that their administration was committed entirely to the discretionary judgment of the Executive branch "without the intervention of the courts." * * * [363 U.S. at 674.]

The Court held that review of the Director's decision could not be had under the Administrative Procedure Act, since Section 10 of that Act bars judicial review of agency action that " 'is by law committed to agency discretion' " (363 U.S. at 670, 676).[38]

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[38] See also, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317–318; *United States* v. *Walker*, 409 F. 2d 477, 480 (C.A. 9); *Knight Newspapers, Inc.* v. *United States*, 395 F. 2d 353, 358 (C.A. 6); *Heffelman* v. *Udall*, 378 F. 2d 109, 111–112 (C.A. 10); certiorari denied, 389 U.S. 926; *Balanyi* v. *Local 1301, Internat'l Bro. of Electrical Workers*, 374 F. 2d 723 (C.A. 7); *Chernock* v. *Gardner*, 360 F. 2d 257, 259 (C.A. 3); *Ferry* v. *Udall*, 336 F. 2d 706, 711–712 (C.A. 9), certiorari denied, 381 U.S. 904; *United States* v. *Wiley's Cove Ranch*, 295 F. 2d 436, 440–

In the present case, Section 21(e) of the Act provides that the Commission "may in its discretion" bring an enforcement action whenever it appears to the agency that the law is being violated. The broad "permissive terms" in which this authority is granted similarly indicate that its "administration was committed entirely to the discretionary judgment of [the Commission] 'without the intervention of the courts' " and that the courts were not intended to review the adequacy of the legal grounds upon which the Commission may have acted.[39] This conclusion also follows from our basic submission that the Commission's decision not to object if Dow omitted the Committee's proposal in no way determined any rights of the Committee; for if that is so, then any legal error involved in that decision had no effect upon the Committee.

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441 (C.A. 8). Cf. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 106.

[39] There is, in effect, "no law to apply" when the agency makes its determination. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410; *Legislative History* at 212; cf., *id.*, at 275; Saferstein, *Nonreviewability: A Functional Anaylsis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367, 370 n. 16 (1968).

In discussing similar language in the Public Utility Holding Company Act of 1935, the court in *Dyer* v. *Securities and Exchange Commission*, 291 F. 2d 774, 781 (C.A. 8), stated that "the Commission has been given absolute discretion as to exercise and exclusive judgment as to field and scope," and that a demand for investigation of an alleged proxy-rule violation invoked the agency's "wholly internal administrative power and function, which the courts have no jurisdiction to compel the exercise of."

4. Finally, even the limited review which the court of appeals has undertaken is unnecessary to protect the Committee's interests, and its probable result is to impede rather than improve the Commission's efforts to protect security holders through informal review of the proxy rules.

a. As we have pointed out, *supra,* pp. 32–33, security holders have an adequate remedy for obtaining a judicial determination of the sufficiency of proxy material and the inclusion of their proposals—they may institute suit in the district court—and the Commission's inaction is legally irrelevant in such a proceeding. Only a district court in such a suit has full power to provide "such remedies as are necessary to make effective the congressional purpose" of Section 14(a) and the rules thereunder. *J. I. Case Co.* v. *Borak, supra,* 377 U.S. at 433; see also *id.* at 431–433.[40] A district court, moreover, is at least as qualified as the Commission or a court of appeals to resolve in the

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[40] In *Borak*, the Court noted (377 U.S. at 431):

> The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H.R. Rep. No. 1383, 73rd Cong., 2d Sess., 13.

Accord, *Mills* v. *Electric Auto-Lite Co., supra,* 396 U.S. at 381; *Securities and Exchange Commission* v. *Transamerica Corp.,* 163 F. 2d 511, 518 (C.A. 3), certiorari denied, 332 U.S. 847.

first instance the type of controversy which normally arises under Rule 14a–8.[41]

Thus, judicial review of the Commission's determination here is not needed "to safeguard the interests of the plaintiffs." *Hahn* v. *Gottlieb,* 430 F. 2d 1243, 1249 (C.A. 1).

The limited prospect for relief offered by the court of appeals serves to underscore the inappropriateness of the review it has undertaken. The court did not provide any affirmative relief to the Committee or decide whether Dow properly could exclude the Committee's proposal. Since the Commission had not stated reasons for its no-action determination, the case has been remanded to the agency for reconsideration. But even if reasons were articulated, the Commission would be free again "to take no action" with respect to Dow's proxy material.

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[41] The Commission, unlike the district courts, has no expertise on the questions of state law which are frequently critical to the determination of these issues; a proposal inappropriate for shareholder consideration under state law may be excluded. See Rule 14a–8(c)(1), 17 CFR 240.14a–8(c)(1). Three other grounds in the Rules for excluding security holder proposals involve factual issues which the Commission has no means to resolve. Among these is the first basis upon which Dow excluded the Committee's proposal: that it was submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes" (Rule 14a–8(c)(2), 17 C.F.R. 240.14a–8(c)(2)). A district court is at least as capable as the Commission to resolve the issues involved in the second ground upon which Dow relied: that the proposal related to "the conduct of the ordinary business operations" of the company. Rule 14a–8(c)(5), 17 C.F.R. 240.14a–8(c)(5).

Thus, even if on remand the Commission were to conclude that Dow is required by the proxy rules to include the Committee's proposal, that decision alone would have no legal effect on Dow. Dow could be compelled to include the Committee's proposal in its proxy material only if the agency or the Committee instituted and prevailed in an enforcement action in the district court. Despite the decision below, more litigation is likely to follow before a final resolution of the controversy between the company and the security holder can be adjudicated, resulting in further delay, additional burdens on the courts, and additional expense to security holders with no concomitant benefit to anyone.[42]

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[42] Illustrative is the recent litigation in *Mougios* v. *W. R. Grace & Co.*, CCH Fed. Sec. L. Rep. ¶ 93,038 (S.D. N.Y.), and *Mougios* v. *Securities and Exchange Commission*, C.A. 2, No. 71–1438. These actions were instituted by a shareholder of W. R. Grace & Co. whose proposal was omitted from Grace's proxy materials. The Commission's staff advised Grace that it would not recommend to the Commission that enforcement action be taken if the company omitted the proposal. The Commission declined to consider the matter. Mougios then instituted two actions. In a district court suit against the company he sought to enjoin the holding of the annual meeting for which the proxies had been solicited. Simultaneously, he petitioned the Court of Appeals for the Second Circuit for review of the Commission's determination not to consider the staff's enforcement determination. The district court did not enjoin the meeting and did not reach the "merits." If Mougios prevails in the court of appeals, the Commission may be required to review the staff's enforcement views; if it then agrees with the staff, Mougios will be in the same situation as the Committee, and could, under the decision below, again seek court of appeals review. Of course, all this will not have resolved the basic dispute or compelled Grace to include the proposal; these still are matters for the district court.

b. Important, too, is a balancing of the interests involved to consider "the impact of review on the effectiveness of the agency in carrying out its assigned role." *Hahn* v. *Gottlieb, supra,* 430 F. 2d at 1249. The Commission's processing of proxy materials presently includes gathering information through required filings with the agency and rendering informal advice with regard thereto. The process does not include taking evidence or making an administrative record and findings. The decision below, however, would tend to change this practice.

The remand ordered by the court requires that the Commision conduct "further administrative proceedings" (App. 47) and that it indicate the basis of its decision to take no action against Dow "clearly on the record" and "in sufficient detail to permit prompt and effective review" (App. 80). If the Commission must satisfy this standard, its procedures necessarily will become less flexible and more time-consuming, since "[c]lose judicial scrutiny inevitably leads to more formalized decision-making." *Hahn* v. *Gottlieb, supra,* 430 F. 2d at 1250. The effect will be to diminish the utility of informal review as an aid to agency supervision and enforcement.[43]

Moreover, if a security holder, who is not required to submit anything to the Commission, can appeal

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[43] See III Loss, *Securities Regulation* 1896 (2d ed., 1961):

> The more formalized the widely used interpretive service becomes, with arguments and perhaps exchange of memoranda or briefs on "appeal" to the Commission, the more cautious both Commission and staff are apt to become in expressing themselves in advance as to the applicability of the acts and rules to particular factual situations.

from a Commission decision of the character here involved, it would seem *a fortiori* that the company itself, which is required to submit its material to the Commission, could appeal from a determination unsatisfactory to it. Cf. *Hahn v. Gottlieb, supra,* 430 F. 2d at 1249. It might do so for reasons unrelated to the merits. For example, a management that expected to be voted out of office might be able to delay that event for a substantial period by appealing from Commission advice that its proxy materials are deficient.

At present, Commission review of proxy solicitation material (including security holder proposals) is conducted speedily, informally, and flexibly. Time is of the essence, since Commission review must be completed within a brief period after the material has been filed with the agency. The expedited handling of the large number of proxy matters submitted annually to the agency would be more difficult under the more formal decision-making process that the court of appeals decision contemplates.

To be sure, that decision applies directly only to security holder proposal disputes. But the agency considers a substantial number of these matters every year and, in light of present social and political trends, the number is rapidly increasing, so that the effects of the court's decision will not be insignificant even on this level alone. See Securities and Exchange Commission, *Thirty-sixth Annual Report* 47 (1971). Furthermore, disputes between security holders and companies in matters under review by the Commission occur not only with respect to security holder pro-

posals, but also with respect to other proxy matters (such as contests for corporate control and conflicts involving mergers) as well as in other areas within the Commission's jurisdiction. The rationale of the decision below suggests the possibility of broad scale judicial review of informal Commission determinations that heretofore have never been regarded as reviewable.[44]

In sum, the review sanctioned by the court below is likely to make the informal procedures which heretofore have enabled the Commission to handle a large and ever-increasing workload[45] more rigid and thus less useful. Such informal procedures, "designed to obviate hardship to the private interest from unnecessary or ill-advised action," through a "more effective and more flexible method of preventing unwanted things from happening," have been characterized as "truly the lifeblood of the administrative process."

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[44] The court of appeals held that review was here available because the Commission had upheld the staff's determination rather than merely declined to review it (App. 68). The court's theory, however, suggests that judicial review would also be available in the latter situation. See Note, *The SEC and "No-Action" Decisions under Proxy Rule 14a–8: The Case for Direct Judicial Review*, 84 Harv. L. Rev. 835, 864 (1971); Note, *Medical Committee for Human Rights* v. *SEC: Judicial Review of SEC No-Action Determinations under the Proxy Rules*, 57 Va. L. Rev. 331, 340 (1971).

[45] Last year, the Commission's staff processed materials relating to more than 5,500 proxy solicitations and more than 3,300 registration statements. In addition, the staff issued more than 5,000 no-action or informal advisory letters or opinions and responded to thousands of letters complaining of some alleged violation of the federal securities laws or seeking Commission enforcement action.

Report at 13, 35, 40. Since there are no significant benefits to be had by permitting judicial review of agency action of this sort, it should not be sanctioned. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 130–132; Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367, 390 (1968).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case should be remanded to that court with instructions to dismiss the petition for review.

Respectfully submitted.

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JULY 1971.

APPENDIX

Relevant Statutes and Rules

Section 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, as amended, 15 U.S.C. 78n(a):

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

Section 21(e) of the Securities Exchange Act of 1934, 48 Stat. 900, as amended, 15 U.S.C. 78u(e):

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may

transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

Section 25(a) of the Securities Exchange Act of 1934, 48 Stat. 901–902, as amended, 15 U.S.C. 78y(a):

Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person is a party may obtain a review of such order in the United States Court of Appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the

court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

Rule 14(a)–8 under the Securities Exchange Act of 1934, 17 C.F.R. 240.14a–8:

Proposals of security holders.

(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer, within the time hereinafter specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify it in its form of proxy and provide means by which se-

curity holders can make the specification provided for by Rule 14a–4(b) (§240.14a–4(b)). The management of the issuer shall not be required by this rule to include the proposal in its proxy statement for an annual meeting unless the proposal is submitted to the management not less than 60 days in advance of a day corresponding to the first date on which the management's proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, except that if the date of the annual meeting has been changed as a result of a change in the fiscal year, a proposal shall be submitted a reasonable time before the solicitation is made. A proposal to be presented at any other meeting shall be submitted to the management of the issuer a reasonable time before the solicitation is made. This section does not apply, however, to elections to office or to counter proposals to matters to be submitted by the management.

(b) If the management opposes the proposal it shall also, at the request of the security holder, include in its proxy statement a statement of the security holder, in not more than 100 words, in support of the proposal, which statement shall not include the name and address of the security holder. The proxy statement shall also include either the name and address of the security holder or a statement that such information will be furnished by the issuer or by the Commission to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor. If the name and address of the security holder is omitted from the proxy statement, it shall be

furnished to the Commission at the time of filing the management's preliminary proxy material pursuant to Rule 14a–6(a) (§ 240.14a–6(a)). The statement and request of the security holder shall be furnished to the management at the same time that the proposal is furnished. Neither the management nor the issuer shall be responsible for such statement.

(c) Notwithstanding the foregoing, the management may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances:

(1) If the proposal as submitted is, under the laws of the issuer's domicile, not a proper subject for action by security holders; or

(2) If it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes; or

(3) If the management has at the security holder's request included a proposal in its proxy statement and form of proxy relating to either of the last two annual meetings of security holders or any special meeting held subsequent to the earlier of such two annual meetings and such security holder has failed without good cause to present the proposal, in person or by proxy, for action at the meeting; or

(4) If substantially the same proposal has previously been submitted to security holders, in the management's proxy statement and form of proxy, relating to any annual or special meet-

ing of security holders held within the preceding five calendar years, it may be omitted from the management's proxy material relating to any meeting of security holders held within the three calendar years after the latest such previous submission: *Provided,* That:

(i) If the proposal was submitted at only one meeting during such preceding period, it received less than 3 percent of the total number of votes cast in regard thereto; or

(ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than 6 percent of the total number of votes cast in regard thereto; or

(iii) If the proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto.

(5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer.

(d) Whenever the management asserts that a proposal and any statement in support thereof may properly be omitted from its proxy statement and form of proxy, it shall file with the Commission, not later than 20 days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to § 240.14a–6(a), or such shorter period prior to such date as the Commission may permit, a copy of the proposal and any statement in support thereof as received from the security

holder, together with a statement of the reasons why the management deems such omission to be proper in the particular case, and, where such reasons are based on matters of law, a supporting opinion of counsel. The management shall at the same time, if it has not already done so, notify the security holder submitting the proposal of its intention to omit the proposal from its proxy statement and form of proxy and shall forward to him a copy of the statement of the reasons why the management deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel.

17 C.F.R. 202.1(d):

The informal procedures of the Commission are largely concerned with the rendering of advice and assistance by the Commission's staff to members of the public dealing with the Commission. While opinions expressed by members of the staff do not constitute an official expression of the Commission's views, they represent the views of persons who are continuously working with the provisions of the statute involved. And any statement by the director, associate director, assistant director, chief accountant, chief counsel, or chief financial analyst of a division can be relied upon as representing the views of that divison. In certain instances an informal statement of the views of the Commission may be obtained. The staff, upon request or on its own motion, will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly

complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.

17 C.F.R. 202.2:

Pre-filing assistance and interpretative advice.

The staff of the Commission renders interpretative and advisory assistance to members of the general public, prospective registrants, applicants and declarants. For example, persons having a question regarding the availability of an exemption may secure informal administrative interpretations of the applicable statute or rule as they relate to the particular facts and circumstances presented. Similarly, persons contemplating filings with the Commission may receive advice of a general nature as to the preparation thereof, including information as to the forms to be used and the scope of the items contained in the forms. Inquiries may be directed to an appropriate officer of the Commission's staff. In addition, informal discussions with members of the staff may be arranged whenever feasible, at the Commission's central office or, except in connection with matters under the Public Utility Holding Company Act of 1935 and certain matters under the Investment Company Act of 1940, at one of its regional offices.

17 C.F.R. 202.3:

Processing of filings.

(a) Registration statements, proxy statements, letters of notification, periodic reports, applications for qualification of indentures, and similar documents filed with the Commission under the Securities Act of 1933 and the Trust Indenture Act of 1939, and certain filings under the Securities Exchange Act of 1934 and the Investment Company Act of 1940 are

routed to the Division of Corporation Finance, which passes initially on the adequacy of disclosure and recommends the initial action to be taken. If the filing appears to afford inadequate disclosure, as for example through omission of material information or through violation of accepted accounting principles and practices, the usual practice is to bring the deficiency to the attention of the person who filed the document by a letter from the Assistant Director assigned supervision over the particular filing, and to afford a reasonable opportunity to discuss the matter and make the necessary corrections. This informal procedure is not generally employed where the deficiencies appear to stem from careless disregard of the statutes and rules or a deliberate attempt to conceal or mislead or where the Commission deems formal proceedings necessary in the public interest. Where it appears that the filing affords adequate disclosure, acceleration of its effectiveness when appropriate normally will be granted.

A similar procedure is followed with respect to filings under the Public Utility Holding Company Act of 1935 and the Investment Company Act of 1940, which are routed to the Division of Corporate Regulation.

U.S. GOVERNMENT PRINTING OFFICE 19[illegible]

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

No. 70-61

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PROJECT ON CORPORATE RESPONSIBILITY, *Amicus Curiae*

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IN THE

Supreme Court of the United States

No. 70-61

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PROJECT ON CORPORATE RESPONSIBILITY, *Amicus Curiae*

INTEREST OF AMICUS CURIAE

The Project on Corporate Responsibility (Project) is a non-profit corporation, incorporated under the laws of the District of Columbia. The purpose of the Project is to study and make recommendations for ways in which corporations can be more responsive to the public interest. As part of this purpose the Project has submitted, and intends

to submit, shareholder proposals to corporations subject to the proxy rules promulgated by the Securities and Exchange Commission. As a shareholder, the Project has availed itself, and intends to avail itself of Commission Rule 14a-8, 17 CFR Section 240. The Project is accordingly interested in the disposition of this case, because of its probable impact upon the availability and practicality of judicial review of rulings of the Commission implementing that rule. With the consent of the parties it submits this brief, amicus curiae, in support of the decision of the court below.

QUESTION PRESENTED

Whether the action of the Commission complained of by respondent in the court below is an "order" directly reviewable by a court of appeals under section 25(a) of the Securities and Exchange Act, so that the court below properly undertook to consider the merits of the Commission's action, and, in the light of such consideration, to remand the case to the Commission for further proceedings consistent with that court's opinion.[1]

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[1]In the court below the Commission argued that the respondent Committee was not a party to a proceeding and not aggrieved. These contentions appear to be but alternative phrasings of the question posed in the petition and do not appear to us to require separate discussion. If the challenged Commission action is an "order" obviously, the procedure leading to it was a "proceeding" under section 25(a) and the Committee's direct interest and participation in it constituted the Committee a party. The adverse impact on the Committee is likewise in issue and is discussed herein as a major reason for regarding the Commission's decision as in substance an "order" for purposes of review.

STATEMENT

In view of the full statement in the brief for respondent we merely outline the principal steps in the proceedings before the Commission and in the court below. Respondent ("the Committee") undertook, pursuant to Commission Rule 14a-8, to require the management of Dow Chemical Company ("Dow") to include in its proxy material a proposal for vote of fellow stockholders on whether Dow's Certificate of Incorporation should be amended to ban manufacture of napalm. Dow, having decided to omit the proposal, was required, not later than 20 days prior to the date prescribed for filing its preliminary proxy material, to submit to the Commission the proposal, its reasons for omission and a supporting opinion of counsel. Dow did so, and as the rule also required, furnished a copy to the Committee. The announced purpose of this procedure is "So that the Commission will have more time to consider the problems involved in such cases and the security holder will have an opportunity to consider the management's position and take such action as may be appropriate." See Securities Exchange Act Release No. 4979 at p. 2; 19 Fed. Reg. 246 (January 14, 1954), quoted in the brief for the Commission at p. 19. The court below concluded with respect to this procedure:

> Thus, the Commission's procedural regulations governing proxy proposals incorporate the basic theory of an adversary encounter and a detailed perusal of Rule 14a-8 and its history reinforces this impression. (App. 60)

By letters dated February 18, 1969, the Commission's Division of Corporation Finance advised the parties that "for reasons stated in your [Dow's] letter and the accompanying opinion of counsel" the staff would "not recommend any action to the Commission" in respect of the contemplated omission. The Committee submitted written response and requested and obtained review of this staff determination by the Commission. The Committee also

requested, but was denied, oral argument before the Commission.

There are two versions of the Commission's action reviewed by the court below:

(a) Its official minute dated March 24, 1970 reads in pertinent part:

> "Upon the recommendation of the Division of Corporation Finance contained in two memoranda dated March 18, 1970, the Commission determined to raise no objection to the omission . . . ." (App. 44)

(b) The text of this minute was not immediately communicated to the parties. They were informed by letters from the Division that the "Commission has approved the recommendation of the Division . . . that no objection be raised if the company omits the proposal . . . ." (App. 42-43).[2]

In dealing with the merits of the Commission's action under review, the court below assumed, in accordance with a past announced interpretation by the Commission, that Dow had the burden of advancing valid reasons for omission of the proposal (App. 61-62, 71-76) citing 19 Fed. Reg. 246 (1954). See also, testimony of then Chairman Armstrong before Subcommittee of Senate Banking and Currency Committee, 85 Cong. 1st Sess., pt. 1 at p. 118 (1957). The court also noted that no issues of fact were raised before the Commission (App. 64).

There was no challenge in the court below to the Committee's contention that the Commission's determination was erroneous. Dow did not participate in the review proceeding. Counsel for the Commission advised the court below (at p. 2 of its brief in that court) ". . . The Commission expressed no view concerning the legal issues. . . . Con-

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[2] The official minute was not made available until after specific request of the Committee. (Statement to court below in brief, dated January 5, 1970, of counsel for Committee at p. 14, n. 2)

sequently, Commission counsel have not been authorized to express on behalf of the Commission any view concerning the application or interpretation of Rule 14a-8 with respect to the Medical Committee's controversy" with Dow.

Since the Commission's decision purported to rest upon recommendations of the Division of Corporation Finance which, in turn, rested upon the reasons advanced by Dow, the court below examined those reasons. The court found them insufficient, because in part inconsistent and in part, at least prima facie, contrary to law. (App. 70-79) Instead of setting aside the Commission's order, the court below stated because of "puzzlement as to how the Commission reached the result which it did" it was "forced to remand the controversy for a more illuminating consideration and decision." (App. 71)

The court did not indicate that a failure of the Commission to articulate reasons for its decision, would be in itself a reason for remand. Rather the basis for remand in this case was the probability of legal error by the Commission, as suggested by the insufficiency of the material presented by management and relied on by the Commission to meet management's burden of justifying the omission of a stockholder proposal, and the fact that Commission counsel had been unable, or unauthorized, to explain the rationale of the Commission's decision.

SUMMARY OF ARGUMENT

The determination of the Commission, upon undisputed facts, and written arguments of Dow and the Committee was a decision on the merits (a) because the Commission expressly based its conclusion on the recommendations of the staff which in turn were "for reasons stated" by Dow. (b) because the Commission must be presumed not to have intended the resulting encouragement of Dow to omit the Committee's proposal unless satisfied that Dow had met the burden of showing that the omission would not violate Rule 14a-8.

The decision was definitive in that it was the final agency action in the matter. The ruling of the Commission, fixed the course of future Commission administration with reference to the controversy, made it possible for Dow to proceed with confidence in a course of action claimed by the Committee to deny it a right conferred by the Rule and created an obstacle to the Committee obtaining judicial enforcement of that right.

These substantial legal consequences give the determination the basic characteristics of a reviewable order. Its negative form, if properly so described, does not prevent review. Expressing the Commission's determination in terms of a determination to "raise no objection" rather than "no violation" in no way lessens the impact upon Dow or the Committee, or the pressure upon the Commission *to refrain from* challenging Dow's omission. Calling the Commission's decision a "no action" ruling confuses analysis and is not a valid reason for denying judicial review.

Holding the Commission's action reviewable does not invade the area of its discretion (a) because only errors of law are involved and (b) because, whatever the Commission's discretion to do nothing about an indicated violation, it has no discretion to declare that proposed action which will involve a violation of law will not be so considered by the Commission.

Review in a court of appeals was the appropriate remedy for the Committee to contest the Commission's determination (a) because it is the "special statutory review proceeding relevant to the subject matter"; (b) because proceeding in a district court against Dow would have been an awkward and a more burdensome method for the Committee to challenge the Commission's ruling; (c) because the Committee did not seek and probably will not need remedies such as an injunction which only a district court can provide; and (d) because the Committee's basic need was to overcome the effect of an adverse ruling by the Commission.

To uphold court of appeals review of Commission rulings in disputes over security holders proposals, does not impose unreasonable administrative burdens in such cases, and is necessary to correct failure on the Commission's part to administer the rule in a manner consistent with the Congressional purpose. Upholding such review has no application to the great bulk of the Commission's informal advisory rulings in response to ex parte inquiries.

Amicus curiae agrees with the position in the brief for the Commission that the basic reasons given by the court of appeals for upholding judicial review of decision of the Commission under rule 14a-8 apply with equal force to a decision of the staff pursuant to delegated authority, provided that the person affected seeks review of the delegated decision and the Commission declines such review.

ARGUMENT

I. THE COMMISSION'S DECISION WAS ON THE MERITS

(a) Dow's Reasons Were Adopted by Reference

The Commission's brief (p. 23-24) suggests that the Commission's decision "to raise no objection" might have been because "it could not firmly conclude . . . that the rules required Dow to include the Committee's proposal, or . . . whatever might be the merits of the case, the issue did not warrant initiating an enforcement suit." The record negates this supposition. The Commission did make clear it had concluded that there was no violation, although this appears indirectly, by reference to other statements and there was no independent statement of Commission reasoning. Its official minute states that its decision was "upon the recommendation of the Division of Corporation Finance. . . ." This recommendation, in turn, as communicated to the parties in letters dated February 18, 1969, was not to "recommend any action for reasons stated in your [Dow's]

letter and the accompanying opinion of counsel." (App. 20a, 21a)[3]

(b) The Commission Could Not Have Intended To Encourage a Violation of its Rule

The context also makes it clear that the Commission's Ruling was on the merits. Disregarding for the moment any internal division between initial staff responsibility and Commission supervision or review, the whole purpose of the Rule 14a-8 procedure is to permit an agency determination whether management has met the burden imposed upon it of justifying an omission of a security holder's proposal. This was susceptible of determination in this case on the written submission's of both parties, there being no issue of fact.

The grounds for omission advanced by Dow involved application to the undisputed facts of standards formulated by the Commission. It was the agency's responsibility to apply these standards to the undisputed facts in a manner consistent with the purpose of Section 14 of the Exchange Act to provide "fair corporate suffrage." See the discussion of the merits in the opinion below (App. 71).

Under the circumstances it was the Commission's responsibility to decide the question presented. We believe the Commission did so decide, and we do not regard its ruling

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[3]The Commission's minute refers to two Division memoranda dated March 18, 1969. These memoranda were not made available to the Committee nor included in the transcript as certified by the Commission to the Court below, but there is no intimation that they were in any way inconsistent with the staff views as previously communicated to Dow and to the Committee. Indeed the petition for a writ of certiorari relies on that earlier expression of staff views as communicated to the parties and describes the "staff's conclusion" as "that under the rules the company was not required to include the proposal" although arguing "that the Commission expressed no opinion" on that conclusion. (p. 11)

as a mere Delphic utterance.[4] Accordingly, we do not urge that this is a case of "agency action unlawfully withheld or unreasonably delayed" within section 10(e) of the Administrative Procedure Act (App. 58) or "merely another manifestation of the venerable bureaucratic technique of exclusion by attrition, of disposing of controversies through calculated non-decisions that will eventually cause eager supplicants to give up in frustration and stop 'bothering' the agency." (App. 67).[5]

Even without other clue to the Commission's reasoning than the statement of its determination "to raise no objection to the omission," the necessary inference is that the Commission did not consider the omission unlawful. Otherwise the Commission would have been in the position of actually encouraging what it deemed to be a violation of law. We submit that there is no warrant for attributing to the Commission such an irresponsible attitude toward its statutory obligations.

We recognize of course that an agency with manifold responsibilities and limited resources may sometimes be justified in taking no enforcement action after learning that an apparent violation of law may have occurred, but this is

[4]Compare the letter of Division Director, later Commissioner, Woodside, cited at p. 21 n. 19 of the Brief for the Commission, C.C.H. Fed. Sec. L. Rep. (52-56 Transfer Binder) ¶ 90, 659. With reference to consideration by both staff and Commission of a dispute under Rule 14a-8 similar to that which occurred in the instant case, the Woodside letter treats a statement of non objection as equivalent to a conclusion that no violation would be involved. Thus the letter states that the Commission "ultimately reached the conclusion it would not object if the company determined to exclude the proposal" and at a later point referring to that determination, states that "the Commission upon full consideration of all views expressed, concluded that the omission would not violate the requirements of the rule, and determined it would not . . . take enforcement action."

[5]These observations in the opinion below may have been directed at arguments similar to those in the Commission's brief in this Court, and would be warranted only if those arguments are accepted.

quite a different matter from giving advance assurance of "no objection" to proposed conduct which the agency considers to be a violation.[6]

(c) Rule 14a-9(b) Is Inapplicable

The brief for the Commission (p. 24) refers to Rule 14a-9(b), as a disclaimer of "definitive determination of whether particular proxy materials comply with the rules when it advises the company as to its views on compliance." If this statement is intended to apply to a ruling in a security holder proposal dispute, as distinguished from a comment on whether proxy disclosures cover the required subject matter and are not misleading, we believe the text of Rule 14a-9(b) does not support the statement.

Rule 14a-9(b) does not deal with proposals that never get into proxy soliciting material but applies in terms only to "soliciting material" which "has been filed with or examined by the Commission." The Rule disclaims a finding of the Commission "that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement therein or any matter to be acted upon by security holders."

Rule 14a-9(b), like Section 26 of the Act, recognizes that cursory and ex parte examination, which is all that is administratively feasible with respect to proposed solicitation material (or reports and financial statements in the case of Section 26), cannot be more than a rough screening process.

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[6]The suggestion in the brief for the Commission (p. 23) that "without a detailed study of the case it could not firmly conclude that the rules required Dow to include the Committee's proposal" involves an improper shift of the burden of persuasion from Dow to the Committee, and is contrary to former Chairman Armstrong's testimony, that "Doubts are resolved in favor of the stockholders." *See* SEC Enforcement Problems: Hearings before a subcommittee of the Senate Banking and Currency Committee 85th Cong. 1st Sess. Part I (1957) p. 118.

Therefore it should not be relied on by the public as a determination by the staff or the Commission "that such material is accurate or complete or not false or misleading." Similarly the public needs to be cautioned that the Commission does not pass on the merits of either management or security holder proposals included in proxy statements. Thus, if Dow had accepted the Committee's proposal and supporting statement for inclusion in its proxy material, whether on its own volition or at the insistence of the Commission, the Commission's examination of the proxy statement, which would then include such material, would involve no "finding" that the proposal had merit, or that the Committee's supporting statement was accurate or not misleading. There is no need, however, to warn the public about proposals or statements they will never see, because omitted from a proxy statement. Moreover, the rule does not purport to disclaim responsibility for specific Commission expressions of opinion. Such disclaimers would serve no useful purpose. For example, if upon examination the Commission should conclude that proxy material is misleading, or fails in other respects to measure up to the requirements of the rule and so advises the filer, there would be no reason for watering down that conclusion by disclaimer of a "finding."

II. THE COMMISSION'S DETERMINATION HAD SUCH CONSEQUENCES AS TO CONSTITUTE IT A REVIEWABLE ORDER.

(a) Nothing Preliminary or Interlocutory Was Involved.

The brief for the Commission concedes (p. 29) that absence of a formal evidentiary hearing does not preclude review where the facts are not in dispute. The Commission's decision was "definitive" in the sense that it was the Commission's last word. As the court below noted "Here the administrative process had run its course . . . and there can be no basis for any fear that review of the decision would cause the courts 'to interfere in matters yet within the con-

sideration of the Commission.'" (App. 56). The Commission's determination thus did not have the preliminary or interlocutory character of the orders involved in *Federal Power Commission v. Metropolitan Edison Company*, 304 U.S. 375, and *United States v. Los Angeles R.R. Co.*, 273 U.S. 299, relied on in the brief for the Commission at pages 29-31.

(b) There Were Substantial Consequences to the Commission's Future Administration, to Dow and to the Committee.

The Commission's ruling unless and until modified by the Commission, or judicially determined to be erroneous, governs the future conduct of the Commission with referral to the Committee's proposal, had significant impact upon Dow's conduct, and stands as an obstacle to the Committee's obtaining judicial enforcement of rights claimed under Rule 14a-8. As a result of the advice received by Dow from the Commission, Dow was assured, and did not need explicit statement, that if it did omit the Committee's proposal there was no appreciable risk that the Commission would refer the matter to the Department of Justice for criminal prosecution, or that the Commission would bring a civil enforcement proceeding. There was similar practical assurance that if the Medical Committee should bring suit in any district court the Commission would not support the Committee either by intervention or as amicus curiae. The brief for the Commission states that there would be no estoppel if the Commission should change its mind and sue for injunction (p. 30). The cases cited scarcely support that conclusion in the event of an immediate reversal of position where no new facts are involved. In any event, the suggestion ignores the enormous moral pressure on the Commission to adhere to a position taken with the expectation of, and followed by, reliance thereon. Dow would moreover be in a position to urge the Commission's interpretation upon the District Court as having at least persuasive force. *See Udall*

v. Tallman, 380 U.S. 1, 16. The petition concedes that whether or not a court would be "legally obliged to do so, courts do give weight to the Commission's views." Petition p. 12, 13 n. 10. Thus, substantial legal consequences flowed from the Commission's determination. Cf. *Pa. R.R. v. United States*, 363 U.S. 202.

The Commission determination necessarily influenced the decision of Dow to omit the Committee's proposal. The possibility, stressed by the brief for the Commission, of a company disregarding a Commission determination that omission of a proposal would be in violation of the rule, in the hope that there could be no enforcement proceedings or in the hope that an enforcement court would disagree with the Commission, does not make that determination lack persuasive force. As this Court noted in *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418, "It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant consequences which failure to conform entails." The application of this observation to Rule 14a-8 determinations is indicated by the fact that apparently, there is but one instance where management has failed to comply with a Commission advisory ruling that a particular proposal must be included in its proxy material. Moreover, management resistance to the Commission in that case proved unsuccessful. *SEC v. Transamerica Corporation*, 163 F.2d 511 (C.A. 3, 1947) cert. denied, 332 U.S. 847. As noted in a recent law review article dealing with the operation of Rule 14a-8, "The Commission's decisions, in whatever form they appear are generally obeyed by the parties." See Schwartz—Public Interest Proxy Contests, 69 Michigan L.R. 421, 434. The Commission's decision thus had impact equivalent to other administrative determinations that have been held reviewable orders. *Columbia Broadcasting System v. U.S.*; *supra*; *Abbott Laboratories v. Gardner*, 387 U.S. 136; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367; *City of Chicago v. United States*, 396 U.S. 162; *Frozen Foods Express v. United States*, 351 U.S. 40.

III. REVIEW DOES NOT INVADE THE COMMISSION'S DISCRETION.

(a) Review Here Serves only to Correct Errors of Law or Abuse of Discretion Which Result in Denial of Relief to Those Within the Zone of Interests Protected by the Exchange Act.

The brief for the Commission concedes, in view of *Rochester Telephone Corp. v. United States*, 307 U.S. 125, that "In the present case the fact that the Commission's determination was negative in form does not bar review." (at p. 31) This concession, however, appears to us a hollow one, in that it ignores a basic premise of the cases repudiating the negative order doctrine: that the function of judicial review is to correct agency errors of omission as well as errors of commission, too little regulation as well as too much. See *City of Chicago v. United States*, 396 U.S. 162. Review by members of the public within the zone of interests protected serves to "vindicate the public interest." *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1001. Without such review, there is no counterbalance to persistent industry pressure to keep regulation to a minimum.

The brief for the Commission, while giving lip service to the doctrine that negative orders are reviewable, would substitute the concept of unreviewable agency discretion as a pervasive bar to review of virtually all denials of relief. Thus, the brief assumes that the issue presented to the Commission by the Committee was merely whether or not the Commission was required to take court enforcement action against Dow after an alleged violation had occurred. Starting with the premise, that the Commission has an unreviewable discretion to decide whether or not to take such enforcement action, the brief claims that even errors of law in an interpretive ruling, when no violation had occurred but which could have a bearing on the possibility of future enforcement action, are beyond the reach of court review. (Brief pp. 35-41)

The brief relies on cases like *Schilling v. Rogers*, 363 U.S. 366 where the policy of a particular statute such as the Trading with the Enemy Act was deemed to preclude any intervention by the Courts. There is no indication, however, that Congress intended Commission interpretation of its rules under the Exchange Act to be out of the reach of judicial review. On the contrary, as the court below noted, . . . the normal "strong presumption in favor of the court's power to review applies" (App. 55, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140). See also *Association of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150, 157.

(b) If Dow's Omission of the Committee's Proposal Would Be Unlawful, the Commission Had No Discretion To Declare It Lawful.

For purpose of determining reviewability, at least, it must be assumed that on the undisputed facts, omission of the committee's proposal would violate Rule 14a-8 and therefore would be "unlawful" within Section 14(a) of the Exchange Act. The outer limits of the Commission's discretion with respect to an indicated violation of the Exchange Act, is to do nothing by way of enforcement action when apprised of an indicated violation. The Commission has no discretion to put its official blessing upon even a past violation by declaring it to be lawful, far less to encourage a violation by advance assurance of a determination "to raise no objection." Such affirmative action on the Commission's part presents the classic occasion for judicial review. Moreover, the brief for the Commission does not deny that the public interest standards of 14(a) of the Exchange Act, as implemented by Rule 14a-8, afford adequate standards for judicial review of its application of the Rule.[7]

[7]Indeed the brief for the Commission argues (pp. 42-43, n. 41) that a district court, at least, is competent to apply those standards even without guidance from the Commission.

It is in this context that the opinion below (at p. 69) quotes *Rochester*.

> "If the Commission was found to have proceeded on erroneous legal principles the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles." 307 U.S. 125, at 136.

See also *McGrath v. Kristensen*, 340 U.S. 162, *Perkins v. Elg*, 307 U.S. 325, *Office Employees Union v. N.L.R.B.*, 353 U.S. 313.

IV. CALLING THE COMMISSION'S DECISION A "NO ACTION" RULING ONLY CONFUSES ANALYSIS AND IS NOT A VALID REASON FOR DENYING JUDICIAL REVIEW.

(a) The Instant Determination Differed in Context, Purpose and Effect from the Commission's Typical Ex Parte Advisory Ruling.

One significant distinction between Rule 14a-8 determinations and the Commission's typical advisory procedures relates to the propriety of characterizing the decision as a mere "No action" ruling. See brief for the Commission, p. 43. While the Commission's expression of "no objection" in this case, did forecast that the Commission would take no enforcement action if the Committee omitted the proposal, far more was involved. As we have previously urged, there was explicit or at least implicit determination of no violation with significant consequences to the parties.[8]

Reference to the context in which the Commission's typical "no action" rulings occur, will further illustrate the distinction. The typical Commission (or staff) informal advisory ruling is issued, ex parte and confidentially, at the request of a person considering a course of action which he

[8] See pp. 7-11 *supra*.

considers to present a question of legality under a statute administered by the Commission. Typically, the question is whether a person who has acquired an unregistered security may sell it without complying with the registration requirements of the Securities Act of 1933. See Disclosure to Investors, March 1969, a report of an internal study group under then Commissioner Wheat, Chapter VI (p. 152, 156, 175); and William J. Lockhart's report on a Study of No Action Letters and Advisory Processes Administered by the Division of Corporation Finance of the Securities and Exchange Commission (prepared for a committee of the Administrative Conference of the United States), Page 6.[9] Lockhart notes that "substantially all of the letters issued by the Division are no action rather than interpretive letters" (p. 24), that "no action advice is usually given hypothetically in the sense that the staff does not purport to determine questions of evidentiary fact" although the staff insists upon full statement and does check its files for inconsistency, and sometimes requires some substantiation. (pp. 26-27)

This is the type of informal rulings, in the thousands, discussed in the brief for the Commission (p. 47 n. 45). We do not dispute their usefulness, their good repute, or the justification for using language of minimum commitment in disposing of such ex parte inquiries. The typical expression is that, on the basis of the facts presented, the staff will recommend, or the Commission will take, "no action." See article by then Commissioner Richard Smith, 23, Administration Law Review, 133 (March 1971). Conversely, an unfavorable informal ruling may be merely a refusal to issue a "no action" letter. The justification for limited commitment derives from the vast volume of the requests for advice, the need for summary disposition, the confidential

[9]Neither of these studies is concerned with the question of judicial review, but rather with the possibility of adopting formal rules or more frequent published interpretations, to reduce the need for informal ad hoc "no action" rulings. They are cited here only for their descriptive value.

character of the inquiry and the hypothetical and ex parte character of the rulings. The Commission may not properly foreclose the rights of parties not before it. Again, in the area of possible violation of the registration provisions of the Securities Act, the potential civil liability is drastic, and it is appropriate to warn the inquirer of that risk.[10]

(b) The Instant Ruling Differed Significantly from Other Rulings in the Proxy Area

Commission review of proxy statements, outside the area of Rule 14a-8 presents somewhat similar considerations, except that in most cases no clearly formulated question is presented. Rather, there has been filed with the Commission preliminary copy of a document which will be mailed in the form presented, unless the person filing the document is apprised of staff or Commission criticism or objection and decides to conform rather than risk enforcement action by the Commission. In the absence of a specific criticism the filer may be merely told: the staff has no comment. Sometimes a specific issue emerges and the advice may take the form of "no objection" to a particular solution. The preliminary filing is confidential and thus cannot become the subject of dispute with the filer's adversary until after

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[10] A further purpose of the language of minimum commitment may be to avoid premature precedential effect. Whether this purpose is actually achieved, whether the informal opinions should be more frequently couched in affirmative language, and whether the Commission should, or should not, make public more frequently the gist of Commission or staff "no action" rulings, are problems which have been of great concern to the financial ba but are, we believe, remote from the issues in this case. See Discussion by former Chairman Cohen and others. 20 Administrative Law Review 29; 6 Loss Securities Regulation 4023-4026; Davis Administrative Law, 1970 Supplement, § 4.10, p. 205.

mailing. See Rule 14a-6(e).[11] It would not be feasible to provide an opportunity for advance criticism by the potential distributees.[12] In the exceptional case of a contested corporate election, the adversary, of course, is known. Nevertheless, it probably would be impractical to provide adversarial procedures to resolve disputes as to the alleged misleading character of the contestants' successive documents of solicitation. Ex parte procedures are justified by time pressures, by the fact that the contesting parties have an opportunity through their own solicitations to answer the statements of their adversaries and by the further fact that the same ex parte procedures apply both to management and to opposition. "No action" type of rulings are a necessary consequence.

(c) Rule 14a-8 Is Not a Mere Disclosure Requirement

The brief for the Commission argues (p. 19) that a Rule 14a-8 determination by the Commission or its staff is indistinguishable from other determinations in the proxy area in that the Commission's sole purpose in conducting such review has been to ensure full disclosure to public investors." This statement ignores a significant and broader purpose of the rule—to provide "fair corporate suffrage." This as former Chairman Purcell put it, requires something more than an opportunity to "address the assembled proxies" at a

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[11] After mailing, as noted in the brief for the Commission (p. 27) the Commission may be confronted with claims of either contestant that the other contestant's mailed material is false and misleading or otherwise in violation.

[12] Indeed, a distributee who could offer intelligent criticism probably will not be misled and therefore has no need for correction. Moreover, to the extent that the preliminary copy may need correction to avoid misleading impact it would be undesirable that it have such publicity as could result from a public filing.

stockholder meeting. Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 before the House Committee on Interstate and Foreign Commerce. 78 Cong. 1st Sess., pt. 2 at 174-74 (1943). Providing the security holder some meaningful access to the corporate electorate involves different problems and different techniques from merely making sure that management does not use its monopolistic control of channels of communication in a misleading way.

It is true that, prior to the Rule, the Commission interpreted the goal of full disclosure as requiring management to reveal an anticipated security holder proposal if it was soliciting blanket authority to vote on any matter that might come before the meeting. The rule added to the prior requirement of disclosing the anticipated proposal the further requirement that the management proxy material include a proponent's 100 word statement, and also set up procedure for determining whether a proposal is a proper subject for stockholder's action. The rule also curtails what had previously been considered full disclosure, to the extent that it permits omission of a proposal which would be appropriate for stockholder action as a matter of state law. Thus, related Rule 14a-4(b) relieves management of the previously recognized obligation to disclose the proposal when soliciting blanket authority to vote it down.[13]

Whether or not as a matter of semantics it is appropriate to characterize Rule 14a-8 as a mere disclosure rule, the vital distinction between determinations with respect to the justification for omitting security holder proposals, and other aspects of Commission administration in the proxy area, is the special procedure under Rule 14a-8 to resolve

[13]Rule 14a-4(c) provides that "a proxy may confer discretionary authority to vote with respect to . . . .

(4) Any proposal omitted from the proxy statement and form of proxy pursuant to Rule 14a-8. . . ."

See Schwartz—The Public Interest Proxy Contest: 69 Mich L. Rev. 419, 436 n. 76.

the narrow issue of such justification after consideration of the views of both security holder and management.

(d) Ex Parte Resolution of Rule 14a-8 Controversies Is Neither Customary nor Warranted

As a further argument for considering Rule 14a-8 determinations to be indistinguisable from other determinations in the proxy area, the brief for the Commission makes the shocking suggestion that Rule 14a-8 determinations can be made ex parte and without consideration of the security holders response to management's justification for an omission. Thus the brief states (at page 32) "A security holder has neither the right to be heard before the Commission with respect to the proxy material, nor the duty to inform the agency concerning his views thereon."[14] The fact is that the rule requires such notice to the security holder as will enable him to respond to management's attempt to justify omission of a proposal; the practice is to permit submission of opposing views; basic considerations of fair procedure require no less; and failure of the security holder to avail himself of such opportunity as is open to him will obviously prejudice the security holder's case in any subsequent judicial inquiry.

[14] It is not clear from the context whether "the Commission" here is used to refer to the agency heads, in contradistinction from the staff acting under delegated authority, or as referring to the aggregate of the agency. Unless reference is to the aggregate we fail to see the relevance of the observation.

V. THE POSSIBILITY OF RELIEF AGAINST DOW IN A DISTRICT COURT DOES NOT BAR REVIEW OF THE COMMISSION'S ORDER BY A COURT OF APPEALS.

(a) An Appropriate Court of Appeals Is the Specified Forum for Judicial Review.

Section 25(a) by its terms is broadly applicable to review of any "order issued by the Commission in a proceeding under this chapter." Such private enforcement remedies as are available in a district court are not specified in the Act, but are derived from Section 27 which grants the district courts jurisdiction to enforce "violations" of the Act or of rules thereunder and of suits "to enforce any duty or liability created by this title." This Court has held that the consequence is to impose on the district courts a duty "to provide such remedies as are necessary to make effective the Congressional purpose." *J. I. Case Company v. Borak*, 377 U.S. 426. *Borak*, however, in no way suggests that the implied district court remedy curtails the review jurisdiction expressly conferred on the Courts of Appeals under Section 25(a). Preference for the express remedy is confirmed by Section 10(b) of the Administrative Procedure Act which provides that the "form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or in the absence of inadequacy thereof, any applicable form of legal action. . . ."

(b) The Committee's Need Was to Modify or Set Aside the Commission's Ruling Rather Than to Obtain an Injunction Against Dow.

The Commission's argument that only a district court remedy can fulfill the aggrieved security holder's needs, is predicated upon experience in proxy contests and suits to set aside corporate mergers because of allegedly misleading proxy statements. In such cases, the stakes are high, there is need for the general equity powers of a district court to

enjoin a meeting, or if it has already occurred, to shape relief in fairness both to the plaintiff and to the entire class of security holders. For example, there may be a question of setting aside a transaction brought about by a misleading proxy statement. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 cited in the brief for the Commission at pp. 9, 32, 33, 34 and 42.[15]

A security holder who believes his proposal has been improperly omitted has a different problem. An attempt to enjoin the distribution of management's proxy statement, or the holding of the meeting unless management includes the proposal, faces formidable obstacles, in part because of the short interval between Commission ruling and the final mailing by management and the closely following date of scheduled annual meeting. Time pressures on the district court, the potential prejudice to the company of requiring postponement of a meeting if the ultimate determination supports its omission, and the impracticality of requiring a bond from the security holder to cover damages from delay, all add to the normal reasons for judicial deference to administrative expertise in the interpretation of the Commission's own rule. Such considerations were emphasized as reasons for denying injunctive relief in *Peck v. Greyhound Corp.*, 97 F. Supp. 679 (S.D. N.Y.) and *Curtin v. American Telegraph and Telephone Company*, 124 F. Supp. 197 (affirmed per curiam, unreported C.A. 2, April 4, 1954). So far as we are aware, security holders have been uniformly unsuccessful in obtaining injunctions in such disputes.

Rather than attempt to obtain injunctive relief in the face of an adverse Commission ruling, the Medical Committee

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[15] In such cases the failure of the Commission to seek relief is less of an obstacle to the security holder's obtaining relief than in Rule 14a-8 controversies, because the limited and ex parte prior screening of the proxy statement by the Commission may carry little implication that an administrative judgment has focussed upon the specific respect in which the plaintiff may be complaining that the proxy statement was misleading.

sought only, by Court of Appeals review, to negate the impact of the Commission's ruling upon any similar proposals of the Committee applicable to future Dow stockholder meetings.[16]

(c) Court of Appeals Review Is Not a Futile Remedy.

The Commission argues that Court of Appeals relief if available should be considered only a prelude to further litigation. (Br. p. 44). But once the security holder obtains a favorable Commission ruling, as a result of court review, the possibility of management resistance becomes remote. Whether or not the court's decision would conclusively bind management, it would substantially butress the persuasive force of the Commission's ruling in conformity to the mandate; and we have seen that Commission rulings alone are normally sufficient to induce management compliance. See p. 13 *supra*.

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[16] While the petition for review was filed after the alleged violation and indeed after the meeting of the particular year, its purpose was to reach the prospective impact of the Commission's ruling upon future proposals. This prospective impact is recognized in the discussion of the question of possible mootness in the reply brief for the Commission dated February 1971, pp. 4-6.

In Brooks v. Standard Oil Co., 308 F. Supp. 810 (S.D.N.Y.) a security holder whose proposal had been rejected by management, apparently waited until after the meeting to sue the company in a district court for a declaratory judgment applicable to the submission of a similar proposal in connection with a future meeting. The appropriateness of the declaratory judgment procedure was not challenged, but the company prevailed on the merits. Assuming that security holders may use the declaratory judgment procedure in a district court to test the propriety of omission of their proposals, such suits involve basically judicial review of the Commission's determination that omission is consistent with Rule 14a-8, except that the attack is collateral and in a proceeding in which the Commission is not a party. The security holder if successful may still face the prospect of an appeal. It is hard to see an overwhelming advantage of this procedure over the statutory review provided in section 25 of the Exchange Act. See Note 84 Harv. L. R. 835, 855-857, discussing the relative merits of district court suits and statutory review under Section 25 as methods of judicial review.

Since the Committee regarded the Commission's ruling as the major obstacle to realization of the right conferred on it by Rule 14a-8, it sought only the relief from that ruling specified in section 25, namely Court of Appeals review "to modify or set aside in whole or in part" the action of the Commission. Under the circumstances that was a clearly appropriate, if not an exclusive remedy.

VI. THE DECISION BELOW DOES NOT THREATEN A FLOOD OF APPELLATE LITIGATION.

(a) The Decision Applies only to Security Holder Proposal Controversies, and Most Security Holders Are Likely to Accept Adverse Commission Rulings.

The brief for the Commission concedes (pp. 46-47) that the decision applies directly only to security holder proposal disputes. Such disputes have not been numerous although the brief characterizes, without figures, the number as "substantial" and "increasing" (p. 46; compare the vast number of other informal procedures referred to in n. 45 at p. 47).[17] In addition, such stimulants to litigious zeal as prospective emoluments of control are completely lacking. Thus, review proceedings are not likely to be prompted by anything less than a firm conviction that the Commission, in the particular case, has adopted an arbitrary interpretation which fails properly to reflect the policy of section 14 of the Exchange Act.

The brief for the Commission argues, however, that the rationale of the decision below is widely applicable to other proxy matters and to "other areas within the Commission's jurisdiction." Such sweeping application is explicitly rejected in the opinion below, "distinguishing between situations in which an agency gives informal advice and situations in

[17] The Committee's brief in opposition to certiorari gives a detailed breakdown based on the Commission's 1969 Annual Report for the year 1969 (pp. 3-4). We understand that the Committee's brief on the merits will supply additional figures.

which it formally decides among conflicting adversary claims premised on detail legal arguments." (App. 69)

There is ample basis for this distinction. As we have noted (*supra* pp. 16-19) the bulk of the Commission's informal advisory rulings in proxy matters, as in other areas of its responsibility, are confidential when rendered and ex parte, addressed to hypothetical or incomplete factual premises. These rulings are necessarily tentative and "no action" in substance as well as in form, since the Commission cannot purport to adjudicate the rights of parties not before it. The logic of the opinion below does not extend to these typical advisory rulings.[18]

(b) Review at the Instance of a Regulated Company Is Not a Necessary Consequence of the Decision Below and, If Available, the Possibility of Resort to It Is Remote

The brief for the Commission urges as a consequence of the decision below, "it would seem a fortiori that the company itself" could obtain court of appeals review of a contrary holding (p. 45-46). This appears in our view not an inevitable consequence of the decision below, but one which may be separately resolved, on the basis of weighing of quite different considerations. Reviewability at the instance of the company would seem to depend on whether a ruling unfavorable to the company carries some drastic threat of penal consequences, or is no more than a threat to bring

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[18] Assuming erroneous ex parte advice (no action or otherwise), that a security offering need not be registered, the remedy of the future purchaser, if he becomes aware of the violation, is to sue for recision. Even if the advisory ruling should be deemed an "order", Court of Appeals review would not apply since the purchaser was not a party to any proceeding which culminated in such advice. If available, such review would not be sought, because the purchaser's interest is in damages obtainable only in a district court. There would be similar difficulties in the way of contestants in a proxy fight seeking Court of Appeals review with respect to any ex parte advisory rulings concerning the disclosures in their adversaries' proxy statements, and similar preference for district court remedies.

an injunction suit in which the company will have adequate opportunity to contest the ruling by way of defense.[19] A relevant consideration might be whether the Commission had indicated an intention to move promptly for injunction, or appeared to be relying on the in terrorum consequences of its admonition to compel compliance.

Moreover, the problem is of only theoretical importance. As the Commission's brief indicates (pp. 11-12) the disadvantage to the company of being forced to include a proposal in its proxy statement is only "rarely" considered great enough to warrant district court litigation with the Commission. There is no reason to assume that the possibility of court of appeals review would be substantially more attractive.[20]

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[19] See *Ewing v. Mytinger & Casselberry Inc.*, 339 U.S. 594 and discussion of that case in *Abbott Laboratories v. Gardner*, 387 U.S. 145, 146-148.

[20] The brief for the Commission presents an ingenious supposition however (p. 45-46) that "a management that expected to be voted out of office" might want to delay the meeting and could compel such delay by challenging "Commission advice that its proxy materials are deficient." This supposition appears to assume a contested election rather than a dispute over a security holder proposal. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, indicates that in the absence of imminent proceedings for injunction and where a threat of penal consequences exists (in that instance potential revocation of, or refusal to renew a license) even an informal letter ruling constitutes the recipient sufficiently "aggrieved" to warrant review. If there is any basis for concluding that Court of Appeals review would extend to a SEC warning that a proxy statement is "deficient", in the sense of being misleading, that consequence stems from possible extension of *Red Lion*, and not from the ruling in the instant case. In any event, there is no reason to assume that statutory review proceedings, as compared to proceedings in a district court, involve the greater risk of improvident judicial restraints. Section 25(b) expressly provides that the commencement of a review proceeding "shall not unless specifically ordered by the court, operate as a stay of the Commission's order." A fortiorari there would be no automatic stay extending beyond the "order" to the corporate meeting particularly where review is at the instance of a management and the opposition group is prepared to go forward with the meeting.

VIII

EXPERIENCE WITH THE ADMINISTRATION OF RULE 14a-8 DEMONSTRATES THE NEED FOR COURT REVIEW

(a) There Is Need for Articulated Commission Opinions Reconciling Its Interpretation of the Rule, Particularly the Limitations Involved in This Case, with the Congressional Purpose To Provide Fair Corporate Suffrage.

The Court below concluded that judicial review, limited to examining "the legal framework in which discretion must be exercised" was warranted "to assure that the investing public can obtain vigorous, efficient, and evenhanded implementation of the concepts of corporate democracy embodied in the proxy rules." (App. 67-68).

While the discussion of the merits of the Commission's determination is not challenged by the petition and is not directly at issue, some consideration of the merits of this particular decision, and of the Commission's administration of the Rule is none the less relevant to show the need for judicial review in this area.

There are no published Commission opinions interpreting the Rule; and the only published staff interpretation antedates the limiting amendments relied on by Dow.[21] To obtain a comprehensive view of the Commission's administration since addition of these limitations, it is necessary to piece together a variety of not always consistent statements and writing of individual commissioners, staff members and former staff members, and Commission minutes which have been made available to writers in the area, but were prepared for internal record keeping purposes, and not as formal opinions for public distribution.

Reviewing some of this source material, the opinion below noted criticism of the Commission's administration of Rule

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[21] See Exchange Act Release No. 3638 January 3, 1945 quoted in part App. 73.

14a-8 for "violating its own established procedural principles, particularly those relating to management's burden of proof—of affording inconsistent treatment of similar factual situations for no apparent reason." It noted further that "the lack of articulated basis for past decisions encourages management to file shotgun objections to a shareholder proposal urging every mildly plausible legal argument that inventive counsel can contrive..." with the result that "the shareholder often has no idea why his proposal was deemed unworthy or what he can do to cure its defects..." App. 67. There was thus a crying need for the Commission to shed some light in the murky area of the application of Rule 14a-8. Indeed, informality of procedures, and absence of articulated decisions by the Commission in this area appeared to have encouraged management's evasion of the salutory purposes of the rule, rather than to have aided compliance.[22]

(b) The Discussion of the Merits by the Court Below Further Illustrates the Need for Review.

Turning to the merits of the Commission's decision in the instant case, the court rejected as without foundation the contention that state law prevented stockholders from voting on an amendment limiting the scope of Dow's business (App. 76-77).[23] This disposed of Dow's reliance on

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[22] The court below referred specifically to Clusserath, the Amended Stockholder Proposal Rule: A Decade Later, 40 N.D. Lawyers 13 (1964). Since the opinion below, published studies of the Commission's administration of Rule 14a-8 have confirmed the need for an official statement of Commission views to articulate the rationale of seemingly inconsistent disposition of recurrent controversies in its administration. See Schwartz, *supra*, 69 Mich. L.R. 419, 443, 451, 84 Harv. L.R. 835, *supra* 842-844.

[23] See also Del. Code Title 8 § 141a (Supp. 1968), which provides "the business of every corporation organized under the provision of this chapter shall be managed by a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."

clause C(5) excluding proposals "relating to the conduct of the ordinary business operations of the issues." As to that the ordinary business operations of the issuer." As to that representation to the Congress that "ordinary business operations" must have the meaning attributable to it under applicable state law (App. 76-77. The opinion refers to testimony of former Chairman Armstrong quoted in part at p. 74).

The Court then dealt with the other exclusionary limitation relied on by Dow, subparagraph (c)(2) which permits omission "if it clearly appears that the proposal is submitted primarily for the purpose . . . of redressing a personal grievance . . . or promoting general economic political, religious, social or similar causes."[24] The court considered the "pos-

[24]This provision was construed by former Director Baldwin Bane as intended to write into the rule the substance of his prior interpretation published in Exchange Act Release No. 3638, *supra* p. 28. See a letter to the Society of Corporate Secretaries cited in Schwartz *supra*, p. 422, n. 108. So construed, subparagrpah (c)(2) merely excludes basically irrelevant proposals not within the competence of stockholders. Unfortunately the language is also susceptible of the interpretation that it permits rejection because it may be surmised that the security holder with an otherwise appropriate proposal may be suspected of concern for having the corporation operate in what he regards as a socially responsible way. A review of the administration of this exclusion shows vacillation between decision discriminating against proposals by stockholders apparently because assumed to have social motives, and decisions ignoring subjective motivation, but looking only to the effect of the proposal as properly within the competence of a stockholder vote. See *Schwartz, supra,* 68 Mich. L. R. 419, pp. 436-462. Commission and staff rulings subsequent to that involved in the instant case, have apparently reflected greater tolerance for proposals which might be regarded as having some social importance. See discussion of the General Motors Decision in *Schwartz supra* at pp. 451-453 noting disagreement as to this ruling between the Commission's General Counsel and its Division of Corporation Finance and a two to one split among Commissioners.

sibility" that this could support the omission "somewhat more substantial" (App. 77). Examining the matter more closely however, the court found Dow's attempt to show the applicability of this provision only a "fundamentally irrelevant recitation" of some political protests not attributable to the Committee (App. 77). The court concluded that management's assertion of intention to continue the making and sale of napalm as "morally and politically desirable", in spite of adverse effect upon the company's business relations and recruitment activities could not be excluded from control of stockholders. Such a result could not be "harmonized with the philosophy of corporate democracy which Congress embodies in section 14 of the Exchange Act" (App. 79).[25]

The vulnerability to criticism of the Commission's administration of Rule 14a-8, at least since the addition of the two limiting provisions involved in the instant case, contrasts with the almost uniformly favorable comment which it has received for its administration generally. This suggests that the assumed freedom from judicial review for this area of its administration as expounded in the brief for the Commission (at p. 37-38) has not had an altogether healthy consequence.[26]

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[25] *Schwartz* attributes the introduction of the test of primary purpose to an "understandable reaction to much of the abuse it [the Commission] received in respectable quarters for ever having adopted the Rule," and notes that the discrepancy between this language and the statutory purpose of promoting corporate democracy has had unfortunate policy results. Conversely, the line of Commission precedents disregarding speculations as to "motive" and testing a proposal objectively by its effect may reflect recurrent recollection on the Commission's part of the need to construe the rule in conformity with statutory policy.

[26] The brief for the Committee (Part III(c)) shows that the authorities cited do not establish the assumed immunity from judicial review.

VIII

THE DECISION DOES NOT IMPOSE AN UNREASONABLE BURDEN OF FORMALIZATION IN THE AREA TO WHICH IT APPLIES.

In view of the inadequacy of Dow's opinion as relied on by the Commission and its staff, the failure of Dow to intervene in the review proceeding to defend that opinion, the statement of Commission counsel that it lacked authority to defend the Commission's ruling on the merits, even after its preliminary motion to dismiss had been denied, the court below would have been fully warranted in putting an end to the controversy by merely reversing on the ground that Dow had not sustained its burden of proof. We submit, however, that the Commission is scarcely in a position to complain that the court below, out of respect for the administrative process, has afforded the Commission an opportunity to re-examine its decision in the light of the court's opinion.

It may be inferred from the failure to defend the decision on the merits, from Commission rulings in other security holder controversies since the decision below, or from the persuasive force of the discussion of the merits in the opinion of the court below, that the Commission on remand may conclude that Dow's proposal is one which the Rule 14a-8 requires to be included. If that be the case, there is no burden in giving the Commission an opportunity to say so. If, on the other hand, there are good reasons for the Commission to conclude that the proposal was properly omitted, it should welcome an opportunity to expound those reasons.

As to the future decisions in agreement with a company's refusal to include a stockholder proposal, the only burden on the Commission is to insist that the company state adequate grounds as the rule requires. If the grounds urged by the company are inconsistent it is not too burdensome to require that the Commission or its staff indicate a choice between the inconsistent company arguments. Formal Commission opinions should only be necessary where major

problems of uncertainty develop as a result of inconsistent rulings. Even in such cases, if time pressures are great, the opinion may follow decision.

IX

REVIEW UNDER SECTION 25 EXTENDS TO DELEGATED DECISIONS WHICH ARE DENIED REVIEW BY THE COMMISSION

The opinion below observes "here, the full Commission has exercised its discretion to review this controversy" (App. 68), and intimates that the availability of Court of Appeals review "depends upon the Commission's initial determination to review the staff decision" page 30(a). The briefs for the Commission have urged that "the Court's rationale suggests that direct appellate review also would be available where the Commission merely declined to review its staff's decision rather than, as in the present case, declined to overrule it." See, Reply Brief in support of petition, p. 2. See also, brief for the Commission on the merits, p. 47 n. 44.

Upon this one point, amicus curiae support the position of the Commission, subject to the qualification that a person seeking review must first exhaust his administrative remedy by attempting to get Commission review of any delegated staff authority. We submit that there is not a policy distinction between staff delegated authority, which becomes final on failure of the Commission to review it, and a Commission determination upon review of an initial determination of the staff.

Assuming efficient administration by the Commission refusal of review by the Commission will reflect a judgment that the staff decision conforms to Commission policy, and there is then no meaningful distinction between affirmance and denial of review. Assuming that the Commission inadvertently, or arbitrarily, declines to review a staff decision which does not conform to Commission policy, the probability of error and hence the need for judicial review is the greater. In either event an unreviewed determination at a

delegate level has the same immediate effect as a determination of the Commission and should be deemed, the action of the Commission. While not specifically applicable, we believe to be relevant, the policy of Section 8(a) of the Administrative Procedure Act, under which an unreviewed decision of a hearing officer may become "the decision of the agency."[27]

As the above cited Harvard Law Review note observes at pp. 864-5:

> "... if the subject of the determination is not committed by law to agency discretion when the full Commission chooses to review the Division recommendation, it is difficult to understand how it is made any less appropriate—or how the need for review is diminished—by the Commission's refusal to review. The practical consequences of the "no-action" decision are the same for the shareholder regardless of whether the Commission has granted review and affirmed or simply denied review without consideration of the merits. Consequently, the Commission's decision to grant or not to grant review of the staff's determination should not control the availability of direct judicial relief.

See also, Note in 57 Va. L. Rev. 331, 340 (1971).

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[27] It may be noted that in important areas where the Commission has specifically delegated authority for decision making to the staff, it has expressly provided for Commission review at the instance of any party or intervenor or on the Commission's own initiative; otherwise the delegated decision has immediate effect and is deemed the action of the Commission. See Rule XXVI of the Commission's Rules of Practice. While this rule is not specifically applicable, once the Commission faces up to resolution of basic issues of policy, if need be by amendment of Rule 14a-8, its review of staff decisions need not be burdensome. This follows from the recurrent nature of the problems and the absence of factual issues.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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September 1971.

BRIEF FOR RESPONDENT

Supreme Court, U.S.
FILED
SEP 17 1971
CLERK

No. 70-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

SECURITIES AND EXCHANGE COMMISSION, *Petitioner*,

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals
For the District of Columbia Circuit

BRIEF FOR THE MEDICAL COMMITTEE FOR HUMAN RIGHTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-61

SECURITIES AND EXCHANGE COMMISSION, *Petitioner,*

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF FOR THE MEDICAL COMMITTEE FOR HUMAN RIGHTS

QUESTION PRESENTED

Whether the court of appeals has jurisdiction to review the Securities and Exchange Commission's legal determination that under the SEC's "stockholder proposal" rule a particular stockholder proposal may lawfully be omitted from the company's proxy materials.

STATEMENT

A. The Exchange Act and the Proxy Rules

The issue presented in this case, long ago described as a "recurrent central issue" in administrative law,[1] is the reviewability by the courts of an administrative determination. The nature of the Securities and Exchange Commission's determination in this case and its reviewability will be illuminated by first considering the regulatory framework within which the Commission acted.

Prior to passage of the federal securities laws, the growth of large corporations had led in many cases to a divorcement of stockholder ownership from corporate control. As stockholders increased in numbers and became scattered geographically, many were unable to attend their company's annual meeting to elect directors and make the major policy decisions reserved by law to stockholders. Voting by proxy thus became the rule rather than the exception for the ordinary stockholder. See generally Berle & Means, *The Modern Corporation and Private Property* 47-125 (1932).

Management's ability in these circumstances to solicit proxies from all stockholders to be used at the management's discretion at annual meetings became the pivot of control. Using corporate funds for such solicitations, the managers were enabled to perpetuate themselves as directors and to dictate the stockholders' policy decisions at annual meetings virtually without hindrance. The abuses that followed were a principal

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[1] See *Final Report of the Attorney General's Committee on Administrative Procedure* 75 (1941). The report (hereafter "*Attorney General's Report*") is reprinted as S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

concern of the Congress that enacted the Securities Exchange Act of 1934.[2]

Section 14(a) of the Act, 15 U.S.C. § 78n (1964), in sweeping terms forbade the solicitation of proxies of the large corporations "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." As its legislative history shows, the purpose of Section 14(a) was to eliminate past abuses by assuring "fair corporate suffrage" in the future. H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934); *J. I. Case Co.* v. *Borak,* 377 US. 426, 431 (1964). Through regulation, Congress sought to assure that stockholders would henceforth be "enlightened . . . as to the major questions of policy which are decided at stockholders' meetings."[3]

Within two years after the Act, the Commission announced its first set of proxy rules pursuant to Section 14(a). 2 Loss 868. Almost from the outset, the Com-

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[2] 15 U.S.C. § 78a *et seq.* (1964) (hereafter "the Act"). See *SEC* v. *Transamerica Corp.*, 163 F.2d 511, 518 (3d Cir. 1947), *cert. denied,* 332 U.S. 847 (1948): "The control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a) [of the Act]."

[3] S. Rep. No. 792, 73d Cong., 2d Sess. 12 (1934). The report continued: "Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." *Id.* In aiming to enlighten balloting stockholders, Congress' design in Section 14(a) was consonant with the pervading philosophy of the securities laws to assure full disclosure in all matters affecting investors. See Douglas, "Protecting the Investor," 23 *Yale Rev. (N.S.)* 521, 523-24 (1934); 1 L. Loss, *Securities Regulation* 122-28 (1961) (hereafter "Loss").

mission took the position that, when a stockholder intended to propose a lawful corporate action at the company's annual meeting and so informed the management, management must disclose the proposal in the proxy statement which it distributed in advance of the meeting at company expense. Since management used the proxy statement to solicit proxies to vote on matters presented, this disclosure served elementary fairness by informing the solicited stockholders of the proposals on which their proxies would be voted. The Commission therefore ruled that to omit known stockholder proposals would render the proxy statement false and misleading.[4]

More broadly, disclosure of stockholder proposals in the company proxy statements served to give minority stockholders access to other stockholders. Recognizing that stockholders today "can only address the assembled proxies which are lying at the head of the table" (*1943 Hearings* 174 (Chairman Purcell)), the Commission designed its rules to make the proxy machinery "the closest practicable substitute for attend-

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[4] The Commission made such a ruling pursuant to its proxy rule forbidding "false and misleading" proxy statements when an instance of this kind came to its attention during the 1938-1939 proxy season. See *Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 1493*, 78th Cong., 1st Sess. 169-70 (1943) (hereafter *"1943 Hearings"*). In 1940, the Commission announced that it was "seriously concerned" about management's responsibility to communicate such proposals to the stockholders and amended its rules to provide specifically that the proxy statement should include "any matters which the persons making the solicitation are informed other persons intend to present for action" at the meeting. Sec. Ex. Act Rel. No. 2376 (Jan. 12, 1940).

ance at the meeting."[5] Thus, when the Commission promulgated its first full-fledged stockholder proposal rule in 1942, it required not only that management's proxy materials disclose in advance of the meeting all stockholder proposals on "proper subjects" for action but also, if management intended to oppose any such proposal, that it include in the company's proxy materials a 100-word supporting statement prepared by the proposing stockholder. Sec. Ex. Act Rel. No. 3347 (Dec. 18, 1942). Given this advance notice of intended stockholder proposals, the other stockholders of the company could vote for or against such proposals either by proxy or in person, and the stockholder proposal rule thus restored a measure of corporate democracy.

Over the course of years the basic approach of the stockholder proposal rule—now codified as Rule 14a-8, 17 C.F.R. § 240.14a-8 (1971)—has remained unchanged but two significant developments have occurred. First, following the original requirement in 1942 that any proposal on a "proper subject" for stockholder action be included, a series of refining and delimiting exceptions have been incorporated into the rule from time to time, so that today Rule 14a-8(c) includes five detailed exceptions, several of which contain more than one ground for excluding a proposal.

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[5] 2 Loss 869. In substance, "a shareholder in a publicly held corporation will make his voting decision at some point during the solicitation process rather than at the meeting and . . . [any] persuasion will occur during the solicitation process rather than at the meeting." Eisenberg, "Access to the Corporate Proxy Machinery," 83 *Harv. L. Rev.* 1489, 1494 (1970).

Second, a related development was the establishment by the Commission of detailed procedures governing management-stockholder disputes about the excludibility of proposals. Most importantly, these procedures—which the agency itself has described as "formal procedures" (17 C.F.R. § 202.2(b), (c) (1971))—require that management must submit the stockholder's proposal to the Commission in the event management asserts the proposal may be excluded. Rule 14a-8a(d). Other provisions, discussed below, specify the timing of the submission, call for notice by management to the stockholder, and require management to provide both the Commission and the stockholder with a written statement of its reasons for exclusion and a supporting legal opinion of counsel. See pp. 8-11, 26-27, *infra.*

When a dispute under Rule 14a-8 is submitted to the agency, it is initially considered by the Division of Corporation Finance (17 C.F.R. § 200.18 (1971)), to which legal arguments may be submitted by the stockholder in response to management's statement and opinion of counsel. With such materials in hand the staff can and normally does reach an administrative judgment whether the stockholder or management is correct. The Commission may in turn review the staff judgment and "in a number of cases" has heard oral argument and received legal briefs from the private parties "to aid it in its determination . . . ." *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on SEC Enforcement Problems,* 85th Cong., 1st Sess., pt. 1, 118 (1957) (hereafter *"1957 Hearings"*) (SEC Report to Subcommittee).

In practice management has almost invariably accepted the staff or Commission determination as to

whether a disputed proposal has to be included or whether it falls within one of the specified exclusions in the rule. Schwartz, "The Public-Interested Proxy Contest: Reflections on Campaign GM," 69 *Mich. L. Rev.* 419, 434 (1971). Such acquiescence by management is typical of the Commission's administration of all its proxy rules.[6] As to stockholder proposals in particular, the Commission has had to take court action to compel inclusion exactly once in its history, and that more than 20 years ago. *SEC* v. *Transamerica Corp.*, 163 F.2d 511 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948).

In the unlikely event that management were obdurate in refusing to include a proper stockholder proposal, the Commission has manifold remedies. It may institute an injunction action to compel compliance as it did in *Transamerica*, or it can take any of several administrative measures including the delisting of the company's securities. See *Bellanca Corp.*, 38 S.E.C. 405 (1958). The Commission in blatant cases can even request the Attorney General to begin criminal prose-

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[6] See *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on S. 879*, 84th Cong., 1st Sess. pt. 3, 1540-48 (1956) (hereafter *"1956 Hearings"*) (testimony of Chairman Armstrong). As Chairman Purcell observed in the early years of the Commission, when the Commission discovered failures to comply with its proxy rules and advised management that the violations must be remedied, "it was almost always done." See *1943 Hearings* 81-82. In succeeding years voluntary compliance has been attained in the "overwhelming majority" of cases. 2 Loss 931. As the Commission's own brief explains, companies "generally" comply because "their primary objective is to insure prompt distribution of the proxy material with a measure of assurance that the Commission will not institute an injunctive action" (Br. 8).

cution. See generally Sections 19-21 of the Act, 15 U.S.C. §§ 78s-78u (1964); 2 Loss 931-32.[7]

B. The Proceeding Before the Commission

In January 1969, the Medical Committee for Human Rights (hereafter "Medical Committee"), a stockholder in Dow Chemical Company (hereafter "Dow"), invoked Rule 14a-8 by sending to Dow a proposed stockholder resolution for inclusion in the company's proxy statement to be distributed for the May 1969 meeting (A. 10).[8] As finally phrased, the proposal contemplated a stockholder's resolution that would request the Dow management to consider adopting an amendment to Dow's certificate to preclude the company from manufacturing napalm (A. 18).

The Medical Committee informed Dow that the Medical Committee believed, among other objections, that manufacture of napalm was "bad for our company's business" (A. 8). Although Dow's management fully recognized the significant business problems posed by its manufacturing of napalm and had once considered terminating production,[9] it declined to include the pro-

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[7] While the Commission repeatedly asserts that an injunctive action is its sole means to "compel" compliance with the proxy rules (Br. 8, 11, 15), the more severe sanctions such as delisting and criminal penalties do exist for repeated or gross violations, and their availability may partly explain the high degree of voluntary compliance by companies with the Commission's non-coercive proxy rule determinations.

[8] Rule 14a-8(a) requires the stockholder to submit his proposal 60 days in advance of distribution of the proxy statement. A similar proposal had been submitted to Dow by the Medical Committee in 1968 but had been rejected by Dow as untimely (A. 8).

[9] See statement of H. D. Doan, president of Dow (A. 37-39); New York Times, Feb. 10, 1969 (A. 29). See generally D. Whitehead, *The Dow Story* 263-71 (1968).

posal (A. 14). In a letter signed by its counsel (A. 12), Dow asserted that the Medical Committee's proposal was subject, simultaneously, to the exclusion relating to "general causes" (Rule 14a-8(c)(2)) and that governing "ordinary business" operations. Rule 14a-8 (c)(5).

The first of these two exclusions allows management to omit from the company proxy statement a proposal where "it clearly appears" that the proposal was submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes." Rule 14a-8(c)(2).[10] The second allows exclusion where the proposal consists of a recommendation or request that management act respecting a "matter relating to the conduct of the ordinary business operations" of the company. Rule 14a-8(c)(5).[11]

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[10] The "general cause" exclusion was first stated in a release issued in 1945. Sec. Ex. Act Rel. No. 3638 (Jan. 3, 1945). As the release noted, it was stimulated by a specific stockholder proposal that the company's stockholders pass resolutions calling for the revision of the tax and antitrust laws of the United States and other Congressional reforms of the same nature. Affirming that the stockholder proposal rule did not embrace such abstract demands, the release stated that the purpose of the rule was "to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders . . . . [and not] to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature."

[11] The purpose of the "ordinary business" exclusion adopted in 1954 (Sec. Ex. Act Rel. No. 4979 (Jan. 6, 1954)) was apparently to avoid proposals relating to the day-to-day administrative and technical problems of management which are outside the competence of stockholders. The Commission later explained that the "basic reason" for this exclusion is that "it is manifestly impracticable" in most cases for stockholders to resolve ordinary business problems at corporate meetings. *1957 Hearings* 118 (SEC Report to Subcommittee).

When Dow determined, on the basis of its own interpretation of the exclusionary rules, to exclude the Medical Committee proposal, it was obligated under Rule 14a-8(d) to submit the dispute to the agency by filing the Medical Committee proposal with the Commission at least 20 days before Dow would normally file its preliminary copies of its proxy statement. As the Commission has stated, one reason for this advance filing is "so that the Commission will have more time to consider the problems involved in such cases . . . ." Sec. Ex. Act Rel. No. 4979 (Jan. 6, 1954). The rule also required Dow to supply the Commission with a statement of reasons for the exclusion and, since the reasons related to issues of law, to furnish an opinion of counsel in support of the reasons.

When Dow submitted its proposal to the Commission, together with a statement of reasons and opinion of counsel (A. 13-14), Rule 14a-8(d) required Dow "at the same time" to notify the Medical Committee of its determination and furnish it a copy of the statement of reasons and opinion of counsel filed with the Commission. This enabled the Medical Committee to file promptly a responsive statement with the Commission (A. 16), and Dow in turn filed a reply (A. 19).

On February 18, 1969, the Commission's Division of Corporation Finance informed both Dow and the Medical Committee as follows:

> "For reasons stated in . . . [Dow's] letter and the accompanying opinion of counsel, both dated January 17, 1969, this Division will not recommend any action to the Commission if this proposal is omitted from the management's proxy material for the Company's annual meeting pursuant to Rules 14a-8(c)(2) and 14a-8(c)(5) under the Securities Exchange Act of 1934" (A. 21).

The Medical Committee requested that the Division's determination be reviewed by the Commission itself (A. 23), and it submitted a letter-memorandum arguing the issue of includibility at length and supplying appropriate legal citations (A. 26). In particular, the Medical Committee asserted that application of the "general cause" exclusion was inconsistent with the language and the controlling purpose of the exclusion (see p. 9, n. 10, *supra*), and it proffered prior interpretative statements of the Division to show that the "ordinary business" exclusion furnished no possible basis for omitting a proposal concerning a legitimate, significant certificate amendment (A. 27). Dow responded with an answering letter to the Commission addressed to the "general cause" issue (A. 31), and the Medical Committee submitted a reply on the same issue (A. 34).

The Commission exercised its discretion to review its staff's determination, and by letters dated April 2, 1969, both Dow and the Medical Committee were formally informed that "the Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised" to Dow's omission of the Medical Committee's proposal from the proxy statement (A. 42-43).[12]

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[12] The Commission considered the recommendation on March 24, 1969, when it entered a minute in its records stating in relevant part: "Upon the recommendation of the Division of Corporation Finance . . . the Commission determined to raise no objection to the omission" of the proposal (A. 44). The Medical Committee sought a copy of this minute but was not furnished a copy until almost four weeks after the request (A. 51).

C. The Court of Appeals Review

Within 60 days of the Commission's letter of April 2, 1969, the Medical Committee filed a petition in the United States Court of Appeals for the District of Columbia Circuit pursuant to Section 25(a) of the Act, 15 U.S.C. § 78y(a)(1964), and it expressly sought review only of the Commission's legal determination that the proposal could lawfully be omitted (A. 4). Section 25(a) provides in pertinent part that "any person aggrieved by order of the Commission in a proceeding under . . . [the Act] to which such person is a party may obtain a review of such order" by filing a petition with the court of appeals within 60 days.

After certifying the relevant documents to the court of appeals (A. 5), the Commission moved to dismiss the Medical Committee's petition on the ground that the court of appeals lacked jurisdiction to review the Commission's determination. In its accompanying brief, the Commission argued that its determination was not a reviewable order within the meaning of Section 25(a) and was in any event related to matters within the Commission's sole discretion (A. 44). The Commission's brief also observed, but explicitly declined to "urge," that the petition might be considered untimely because filed more than 60 days after the Commission's *in camera* minute and, additionally, that it might be considered moot since Dow's annual meeting had already been held. SEC Mem., July 1969, p. 5.

Following briefing and oral argument on the jurisdictional issue, the court of appeals denied the motion to dismiss without prejudice to its renewal when the case was heard "on the merits" (A. 45). The Medical Committee thereafter briefed the merits of the question

whether on a proper interpretation of Rule 14a-8 its proposal was excludible from Dow's proxy statement. The Commission's answering brief specifically declined to argue the merits and addressed itself once again solely to the court's jurisdiction. This time, however, its brief also included a full-blown argument that the petition should be dismissed as untimely.[13]

The court of appeals rendered its decision on July 8, 1970 (A. 47). 432 F.2d 659. After swiftly disposing of the timeliness objection (A. 51-53), the court canvassed the decisions of this Court and other relevant precedents on the question whether a reviewable order existed. Based on those authorities, it concluded that the Commission's legal determination was administratively final, that the agency proceeding was sufficiently formal to give rise to a reviewable order, and that the adverse impact on the Medical Committee's protected interests was substantial (A. 53-65). Since review was sought only as to the legal determination, the court held that review involved no infringement of the Commission's discretionary authority (A. 65-70).

The court of appeals' opinion then examined the merits of the administrative determination as to the meaning of the stockholder-proposal exclusions. Since the Commission has sought certiorari here only on the question of reviewability, it is enough to note that

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[13] On this issue, the Commission relied on an affidavit by a SEC staff attorney asserting that he had informed a Medical Committee official and its lawyer by telephone of the Commission's action on the day it had entered its private minute (A. 51). The Commission did not dispute that the Medical Committee's petition was filed within 60 days of the letter reporting the Commission's action to the Medical Committee, nor that the minute itself was not made available to the Medical Committee until well after the letter. (A. 52).

the court below, considering the exclusions in light of their own language and purpose together with the underlying Congressional intent, found no sound basis for exclusion of the Medical Committee's proposal under either of the two exclusions invoked (A. 70-79). Out of an abundance of caution, the court of appeals remanded the case to the Commission so that it might "reconsider" the question in light of the court's opinion (A. 80).

Following the court of appeals' decision, Dow in January 1971 agreed to include the Medical Committee's resubmitted proposal for inclusion in Dow's May 1971 proxy statement; Dow agreed to do so without prejudice to its right to reassert at any time that Rule 14a-8 did not require inclusion. In reporting the event to this Court pending certiorari, the Commission took the position that the mootness doctrine did not preclude review since Dow has maintained its legal position and might reject the proposal in future years. SEC Reply Br., February 1971, p. 5.

At the Dow meeting of May 1971 the Medical Committee's proposal, which was included in the company's proxy statement, was defeated by a vote of 22,570,300 shares to 654,237 shares. It is the Medical Committee's intention to propose its resolution again.

SUMMARY OF ARGUMENT

As required under rules established by the Commission, Dow submitted to the Commission a disputed stockholder proposal which the Medical Committee had requested Dow to include in the company's annual proxy statement. Rule 14a-8. After receiving the legal contentions of both parties, the Commission's

staff explicitly determined that Rule 14a-8 allowed Dow to exclude the proposal on the legal grounds advanced by Dow, and the Commission, in reviewing the staff determination, in substance adopted the staff's legal position. Review of the Commission's legal determination by the court of appeals was not foreclosed by "agency discretion" since such review related only to a legal question and did not concern or trammel the Commission's enforcement authority. *McGrath* v. *Kristensen,* 340 U.S. 162 (1950); *Perkins* v. *Elg,* 307 U.S. 325 (1939).

The Commission's determination in this case was properly subject to review in the court of appeals under Section 25(a) of the Act. The determination constituted an "order" for purposes of review (*Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1970)) and met each of the other statutory prerequisites. There is no evidence that Congress intended to foreclose review of the type of determination made here, and the presumption of reviewability recognized by this Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), accordingly governs. The restrictive "gloss" that the Commission seeks to impart to the Act is inconsistent with the remedial approach taken by this Court in *J. I. Case* v. *Borak,* 377 U.S. 426 (1964), and is not supported by any of the authorities cited by the Commission.

Direct review of the Commission's determination by the court of appeals is consonant with that court's jurisdiction over other SEC orders and is the method Congress has generally deemed most suitable for review of agency decisions. H. R. Rep. No. 2122, 81st Cong., 2d Sess. (1950) (Judicial Review Act of 1950). Such

review will operate in the normal instance to provide the stockholder with efficient, inexpensive review and, where he is successful, with full and effective relief. The alternative of a district court injunction suit by the stockholder against the company is not adequate to protect stockholder rights because of time limitations, stringency in granting equitable relief, and the difficulty of overcoming the Commission's adverse determination in its absence. In any event, the possible availability of such a remedy does not preclude resort to direct court of appeals' review pursuant to statute.

The prediction that direct judicial review will result in a significant administrative burden for the Commission is not consistent with experience. *Office of Communication of the United Church of Christ* v. *FCC,* 359 F.2d 994 (D.C. Cir. 1966). The facts show that such review of stockholder proposal determinations will be sought only in a limited number of instances, and such review neither compels, nor implies the propriety of, review in other dissimilar situations. Direct review will serve the interests which Congress sought to secure through Section 14(a) of the Act and which this Court recognized in *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), and will improve administration of the stockholder proposal rule by providing judicial guidance to the Commission.

ARGUMENT

I. THE COMMISSION'S ACTION RESTS UPON A LEGAL DETERMINATION OF THE KIND CUSTOMARILY SUBJECT TO JUDICIAL REVIEW, AND REVIEW OF THAT DETERMINATION DOES NOT INFRINGE UPON "AGENCY DISCRETION."

A. The Commission's Action Embodies a Legal Determination

It may clarify discussion to dispose at the outset of several matters collateral to the core issue of reviewability. As its opinion makes clear, the lower court concluded that the Commission, in accepting its staff recommendation concerning the Medical Committee's proposal, must be deemed to have acted upon a "legal theory" (A. 68).[14] While the Commission's own brief has suggested that the "precise basis" of the Commission's action in this case cannot be known (Br. 24), by any fair and reasonable test the court of appeals correctly charged the Commission with having resolved the legal question tendered to it.

Throughout the agency proceeding at both the staff and Commission levels, Dow, the Medical Committee and the Commission's own staff all treated the controversy as turning on the proper interpretation of Rules 14a-8(c)(2) and (5), which set forth the "general cause" and "ordinary business" exclusions. The staff rested its own determination squarely upon the

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[14] Because the Commission did review the proposal, the court of appeals was not required to determine whether the staff's action, which was explicitly based on legal grounds, would be reviewable standing alone. We do not believe that it is essential for this Court to resolve now any question concerning reviewability of staff action. As a matter of fact, however, the Commission has generally been willing to review the staff determinations on stockholder proposals whenever requested to do so by either the stockholder or the management. See statement of Chairman Budge, July 12, 1970, quoted at BNA Sec. Reg. & Law Rep., Sept. 16, 1970, p. D-3.

legal "reasons stated in . . . [Dow's] letter and the accompanying opinion of counsel" (A. 21), namely, the asserted application of the exclusions just cited (A. 21). The argument of both the Medical Committee and Dow to the Commission was directed solely to this question (*e.g.*, A. 24).

Since the Commission exercised its discretion to review its staff determination and expressly declared that "upon the recommendation" of its staff it would raise no objection to Dow's omission of the proposal (A. 43-44), there is every reason to conclude that it was acting on the only question raised: the proper interpretation of specified exclusions contained in its own stockholder proposal rule. In order to invoke court of appeals' authority to review the determination it would be sufficient if there were merely a reasonable *possibility* of legal error by the agency.[15] Here the events leading up to the Commission's action make its "legal premise" (A. 68) virtually a certainty. Whatever doubts the Commission may now seek to insinuate are, moreover, quickly dispelled by an examination of the legal context of its action.

The Commission's brief speculates that the Commission, in deciding to raise no objection to Dow's position, "might have concluded that, without a detailed study of the case, it could not firmly conclude that the rules required Dow" to include the Medical Committee's proposal (Br. 23). Yet the Commission

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[15] *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965); *Northeast Airlines* v. *CAB*, 331 F.2d 579, 587 (1st Cir. 1964). The principle that review is warranted wherever legal error *may* well have influenced the result below is not, of course, confined to agency action. See, *e.g.*, *Sunkist Growers* v. *Winckler & Smith Co.*, 370 U.S. 19, 30 (1962) (error in jury instructions).

itself has explicitly affirmed that Rule 14a-8 "places the burden of proof upon the management" to show that a proposal may be excluded (Sec. Ex. Act Rel. No. 4979 (Jan. 6, 1954)); in the words of Chairman Gadsby, the Commission requires a "clear showing" before acquiescing in omission of a proposal.[16] In sum, if the Commission had not been able to "firmly conclude" the matter one way or the other, as its brief now suggests, then its own rules and practices would have compelled it to resolve the dispute in the Medical Committee's favor.[17]

There is even less substance to the alternative suggestion that the Commission "might have determined that, whatever might be the merits of the case, the issue did not warrant initiating an enforcement suit" (Br. 23). Whether or not the Commission might take this view if enforcement ultimately became necessary is beside the point;[18] for such an improvised hy-

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[16] Gadsby, "Current Problems in the Vital Area of Securities Regulation," 191 *Com. & Fin. Chron.* 1825, 1852 (1960). As the Commission has explicitly stated, "doubts are resolved in favor of the stockholder, and the management is required to include the proposal in the proxy material." *1957 Hearings* (Report of SEC to Senate Subcommittee). See also statement of Chairman Armstrong, *1956 Hearings* 1546; 2 Loss 904, 909.

[17] The Commission cannot, of course, ignore its own rules and practices on an *ad hoc* basis. See *Service* v. *Dulles*, 354 U.S. 363, 372 (1957); *Chapman* v. *Sheridan-Wyoming Co.*, 338 U.S. 621, 629 (1950); *Cappadora* v. *Celebreeze*, 356 F.2d 1, 6 (2d Cir. 1966).

[18] It is surprising that its brief should ascribe such an attitude to the Commission, even on a speculative basis, when it is considered how important this Court has deemed protection of stockholder rights under Section 14(a). See, *e.g.*, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). If this were the Commission's attitude, it would merely emphasize the urgency of direct judicial review. See pp. 58-59, *infra*.

pothesis cannot reasonably explain the Commission's failure at the outset to raise an objection which, according to its own experience, would almost automatically have been honored by Dow. See p. 7, *supra*.

More broadly, the conjectures now tendered by the Commission's brief conflict with its own explanation of its usual function in reviewing proxy submissions: in Chairman Armstrong's words (quoted Br. 25), the Commission normally determines, so far as it can ascertain from available information, whether the company has or has not failed "to comply with the standards of the proxy regulations." Having applied the "standards" of Rule 14a-8 to countless stockholder proposals over the last thirty years, the suggestion now that the Commission in this case has suddenly departed from the pattern and acted here on essentially non-legal grounds deserves even less weight than the usual "*post hoc* rationalizations" of appellate briefs. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1968).

It is, finally, quite significant that at no point in this litigation has the Commission itself ever asserted that in actuality it found the Medical Committee's proposal too close a case to resolve or its own resources inadequate to protect stockholder rights found scanted under Rule 14a-8. Nor has the Commission ever denied that its action rested upon a legal premise; instead it has adamantly refused either to explain or defend its action in any of its briefs. In these circumstances it would be unfair, as well as irrational, to allow the Commission to foreclose review by persistent silence as to its actual grounds of decision and by fanciful speculations about grounds it "might" have adopted.

B. "Agency Discretion" Does Not Foreclose Review

Since the Commission must fairly be charged with having acted upon a legal determination, it cannot plausibly be maintained that judicial review *limited to that determination* constitutes an invasion of matters reserved to agency discretion. In this instance, review of the Commission's legal premise was all that the Medical Committee asked (A. 4) and all that the court of appeals undertook (A. 80). The Commission's discretion relates to matters unaffected by the relief sought or granted, and this Court's decisions discussed below establish that agency legal determinations may be judicially reviewed whether or not they are made in the course of the agency's performance of a "discretionary" function.

The Commission's brief notes that Section 21(e) of the Act, 15 U.S.C. § 78u(e) (1964), provides that the Commission "may in its discretion" sue for injunctions to enforce the Act, and it seeks to bring the Commission's determination here within the cloak of this discretion by repeatedly implying that what the Medical Committee seeks is to compel the Commission to take "enforcement action" against Dow (Br. 9, 36, 41). Yet the Medical Committee has never requested the Commission to bring an injunction suit nor sought to dictate which if any of the various enforcement tools the Commission might employ in the conjectural event that Dow refused to include a stockholder proposal in disobedience to the views of the Commission. See pp. 12-13, *supra*. The discretion which the Commission might properly exercise in the face of such contumacy was not at issue in

this case and was freely acknowledged by the court of appeals (A. 65-70).[19]

Nor is judicial review of the Commission's legal determination precluded merely because such a determination might be made the premise for a Commission decision as to whether to seek injunctive relief or to take other discretionary enforcement measures. A line of decisions of this Court makes it plain beyond peradventure that an agency or executive official's legal determination is in no way insulated from judicial review simply because it relates to or is made in the course of exercising a "discretionary" function. *E.g., McGrath* v. *Kristensen,* 340 U.S. 162 (1950); *Perkins* v. *Elg,* 307 U.S. 325 (1939).[20]

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[19] Nevertheless, agency discretion in choosing whether to enter upon an administrative investigation or pursue a judicial remedy is less absolute than the Commission appears to believe. As the Administrative Procedure Act (hereafter "APA") indicates (Section 10(e)(2)(A), 5 U.S.C. § 706(2)(A) (Supp. V, 1970)), and this Court has confirmed, "patent abuse" of discretion may be reviewable even in agency enforcement matters. See *Moog Industries, Inc.* v. *FTC,* 355 U.S. 411, 414 (1958); *FTC* v. *Universal Rundle Co.,* 387 U.S. 244, 251 (1967).

[20] See also *Office Employees Int'l Union* v. *NLRB,* 353 U.S. 313 (1957); *ICC* v. *Humboldt Steamship Corp.,* 224 U.S. 474, 484 (1912); Saferstein, "Non-Reviewability: A Functional Analysis of 'Committed to Agency Discretion,'" 82 *Harv. L. Rev.* 367, 395-96 (1968). The *Attorney General's Report* (p. 86), citing the *Humboldt* case, summarized the governing principle thusly: "In some instances review may be unavailing because the determination of whether or not action should be taken in the circumstances may have been committed to the exclusive judgment of the administrator as to the public interest and convenience. But if the denial is based on an erroneous interpretation of law, judicial review is available to remove at least that barrier."

Thus, in the *Perkins* case this Court reviewed a legal determination made by the Secretary of State in denying an applicant a passport on the ground of lost citizenship. The Court's opinion expressly acknowledged that as the law then stood the granting of passports was a "discretionary function," but it found that judicial review limited to the legal determination "would in no way interfere with the exercise of the Secretary's discretion . . . but would simply preclude the denial" on the basis of an erroneous legal theory. 307 U.S. at 349-50.[21] Similarly, in *McGrath,* the Court reviewed a legal determination of the Attorney General made in the exercise of his discretionary function of determining whether to suspend a deportation.

The Commission seeks to distinguish this long-standing line of authorities by arguing that such focused review of legal errors is confined to cases "where a statute specifies the standards" for exercising discretion, and it says that the "teaching" of *Schilling* v. *Rogers,* 363 U.S. 666 (1960), is that review even of legal errors is foreclosed when "the statute provides no standards" (Br. 39-40). If this were the test, review is well justified in this case since the standards relied on are contained in agency regulations promulgated pursuant to statute and having the force of law, and the legal standards fixed by Rule 14a-8 are quite as specific as the standards applied in *Perkins* or *McGrath.*

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[21] In Mr. Justice Jackson's pithy statement, under the principle of *Perkins* "the Secretary might say that . . . [Miss Elg] would get no passport but he could not, for unjustifiable reasons, say she was ineligible for one." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 185 n.5 (1951) (concurring opinion).

Moreover, the Commission's brief cannot be correct in characterizing the "teaching" of *Schilling,* since the statute there involved fairly bristled with standards. See 363 U.S. at 667-68, 675. The fair reading of *Schilling* is that, based upon the particular legislative plan and the relationship to foreign affairs, this Court perceived a deliberate Congressional intent to bar judicial review on any aspect of the executive action sought to be reviewed in that case. See 363 U.S. at 674; Jaffe, *Judicial Control of Administrative Action* 348 & n. 129 (1965) (hereafter "Jaffe"). As demonstrated below, there was no Congressional intent to preclude review in this case, and Congress' general policy squarely supports reviewability. See pp. 34-37, *infra.*

The Commission is equally infirm in relying on the "discretion" exception of the APA quoted in part in its brief (Br. 37). So far as is here relevant, that provision contemplates that there shall be judicial review of agency action "except *to the extent* that . . . agency action is committed to agency discretion by law." Section 10, 5 U.S.C. § 701(a)(2) (Supp. V, 1970) (emphasis added). In explaining this provision—which this Court has since characterized as "a very narrow exception," *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971)—the House Report on the APA neatly summarized the law applicable to this case:

> "Matters of discretion are necessarily exempted from the section . . . . [b]ut that does not mean that questions of law properly presented are withdrawn from reviewing courts." H. R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946).

The "all or none" conception of agency discretion, implicit in the Commission's argument here, has as

little support in policy as it does in law.[22] Agency "enforcement" discretion is rightly respected within wide limits when an agency, faced with the choice of litigating or investigating, fixes its priorities and makes its decisions based on budget and personnel considerations. See *Moog Industries, Inc.* v. *FTC,* 355 U.S. 411 (1958). When agency action turns, however, not on such considerations but on an isolatable determination of law, no such policy of non-interference with agency discretion requires a court to stay its hand, and the very term "discretion" is out of place. See *ICC* v. *Humboldt Steamship Corp.,* 224 U.S. 474, 484 (1912).

II. UNDER THE PLAIN LANGUAGE OF SECTION 25(a) AND THE CONTROLLING DECISIONS OF THIS COURT, THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE COMMISSION'S LEGAL DETERMINATION.

A. The Statutory Prerequisites for Review Have Been Met

As the Commission agrees (Br. 28), Section 25(a) of the Act, read in conjunction with the APA and decisions of this Court, is unquestionably the governing jurisdictional statute. So far as here relevant, it provides that any person "aggrieved" by an "order" of the Commission in a "proceeding" to which the person is a "party" may obtain judicial review in the

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[22] 4 Davis, *Administrative Law* 33, 84-85 (1958) (hereafter "Davis"). As one court observed not long ago, "Almost every agency action involves some degree of discretion. Yet it cannot be said that, for this reason, every agency action is unreviewable." *Ferry* v. *Udall,* 336 F.2d 706, 711 (9th Cir. 1964), *cert. denied,* 381 U.S. 904 (1965). Compare *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 137 (1939): "[I]f the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles."

courts of appeals. Since the Commission's brief seemingly argues that all of the four elements are lacking in this case, it is appropriate to consider each of them in turn.

First, neither Section 25(a) nor the APA purports to limit the "proceeding" giving rise to a reviewable order to any fixed procedures, nor to specify any minimum degree of formality. Nevertheless, the presence of formalities usually supports reviewability, as the court of appeals recognized (A. 58-63). In this case, as in other stockholder proposal disputes under Rule 14a-8, highly structured agency procedures—which the Commission itself characterizes as "formal procedures" (see 17 C.F.R. §§ 202.2(b), (c)(1971))—governed most of the steps in sequence leading to the Commission's determination.

As previously noted, the stockholder proposal rule directs that the proposal itself must be submitted to management at least 60 days before the proxy statement is to be issued (Rule 14a-8(a)); it specifies what measures must be taken if management includes the proposal but plans to vote against it (Rule 14a-8(b)); and it sets forth five exceptions to the general rule of inclusion. Rule 14a-8(c). If, as in this case, management does invoke the exceptions, it is required by the rule to submit the proposal to the Commission at least 20 days before submitting its preliminary proxy materials; and, pertinently, management must then furnish both the Commission and the stockholder with its statement of reasons including an opinion of counsel on issues of law. Rule 14a-8(d).

The Commission's regulations designate the Division of Corporation Finance as responsible for passing upon

proxy problems in the first instance. 17 C.F.R. § 200.18 (1971). The Commission itself concedes that, in stockholder proposal disputes, "there are two interested private parties: the management and the shareholder" (A. 60), and the burden of proof is upon management to establish that an exclusion applies. See p. 19, *supra*. As a matter of settled practice the views of both private parties are considered by the agency (A. 60), and the Commission exercises a discretionary review of its staff's determination. See p. 6, *supra*.

In sum, the Commission—operating within the framework of detailed "formal procedures" supplemented by settled practices—compels the company to submit stockholder-proposal disputes to the Commission, treats them as adversary controversies, and resolves them by applying explicit legal standards. The Commission itself admits that an evidentiary hearing is not needed in order to have a "proceeding" under Section 25(a), and the authorities compel that concession. *E.g., Phillips Petroleum Co.* v. *FPC,* 227 F.2d 470 (10th Cir. 1955), *cert. denied,* 350 U.S. 1005 (1956); *Isbrandtsen* v. *United States,* 211 F.2d 51 (D.C. Cir. 1954). See Jaffe 420. Not surprisingly, the Commission has never specified in any of its briefs in this case exactly which formalities, short of an evidentiary hearing, it believes are required for a "proceeding" but were omitted here.

There are, of course, many statutes which explicitly limit review to orders resulting from certain prescribed types of agency proceedings.[23] No such restrictive language appears in Section 25(a) and, ac-

[23] *E.g.*, Social Security Act, § 205(g), 42 U.S.C. § 405(g) (1964); Food, Drug and Cosmetic Act, § 701(f), 21 U.S.C. § 371(f) (1964); Communications Act of 1934, § 402(b), 47 U.S.C. § 402(b) (1964).

cordingly, it is fully appropriate to give "proceeding" its plain meaning as a "comprehensive term." *Rice* v. *United States,* 356 F.2d 709, 712 (8th Cir. 1966). When the mere acceptance of a gas rate schedule for filing by the FPC constitutes a "proceeding" under the analogous review provision of the Natural Gas Act (Section 19(b), 15 U.S.C. § 717r(b) (1964)), there is no warrant whatever for withholding that designation from the SEC's procedures in this case. See *Cities Service Gas Co.* v. *FPC,* 255 F.2d 860 (10th Cir. 1958).

A second precondition of judicial review under Section 25(a) is that the proceeding give rise to an "order." The APA, which is to be read *in pari materia* with existing review statutes,[24] sweepingly defines an order as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making . . . ." Section 2(d), 5 U.S.C. § 551(6) (Supp. V, 1970). Plainly the Commission's action in this case represents a "final disposition" so far as the administrative process is concerned, so that judicial review is in no way a premature intrusion into an on-going agency proceeding.

It is well settled that the "particular label" placed by an agency upon its action does not control the question whether there is a reviewable order but rather "it is the substance" which is decisive. *CBS* v. *United States,* 316 U.S. 407, 416 (1942). See also *Phillips* v. *SEC,* 388 F.2d 964, 968 (2d Cir. 1966); 3 Loss 1927.

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[24] *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1970); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971); *In re Engineers Public Serv. Co.,* 221 F.2d 708, 712 (3d Cir. 1955) (SEC proceeding). The Commission's brief itself several times invokes the APA and its legislative history on the reviewability question. *E.g.,* Br. 37, 41.

As shown below (pp. 32, 49, *infra*), the "substance" of the Commission's action here was a legal determination having a substantial adverse impact on the Medical Committee's protected interests. So far as the notion of an "order" may imply some minimum "formal characteristics" (Jaffe 419), those formalities are amply supplied by the Commission's written determination in this case and by the rules and practices which led up to it.

Red Lion Broadcasting Co. v. *FCC,* 395 U.S. 367 (1970), lays to rest any argument that the Commission's action here is not an "order" for purposes of judicial review. In *Red Lion,* this Court held that an FCC letter applying the fairness doctrine to a specific broadcast was a reviewable "order," noting that the FCC "could have" resolved the same issue in a license revocation proceeding or by formal declaratory order under the APA. 395 U.S. at 372-73. The SEC's authority to consider whether Rule 14a-8 applies to a specific stockholder proposal is no less clear,[25]

[25] The SEC could, for example, determine the same issue here presented by order in a proceeding to delist a security (*e.g., Bellanca Corp.,* 38 S.E.C. 405 (1958)); and by the same token it is empowered to issue declaratory orders under the APA. *E.g., In re Pacific Northwest Power Co.,* 41 S.E.C. 863 (1964). Since the SEC can thus issue orders of several kinds determining the applicability of Rule 14a-8, it is merely a play on words for the Commission to suggest that its determination in this case cannot be an "order" because the Commission has no power under Section 14(a) to issue mandatory orders directing companies to comply with the proxy rules. See A. 62-63; SEC Br. 14-15. Whether or not the Commission has power to issue such mandatory orders, it is clearly entitled to make other kinds of orders implicitly or explicitly applying those rules to the facts at hand, and its determination in this instance represents just such an order. Note, "The SEC and 'No-Action' Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review," 84 *Harv. L. Rev.* 835, 859 (1971).

and its determination here is reviewable as in *Red Lion* whether or not it resolved the dispute "with all of the formalities for an adjudicative proceeding . . . ." *Id.*

As the APA and numerous decisions of this Court make clear, it is no objection to reviewability that the Commission's determination here was embodied in a refusal to act rather than an affirmative grant of relief. See Section 2(d) of the APA, 5 U.S.C. § 551(6) (Supp. V, 1970); *City of Chicago* v. *United States,* 396 U.S. 162, 166 (1970); *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 142-43 (1939). Whatever abstract categories may long ago have circumscribed reviewable orders, the test for many years has been a pragmatic one looking to the substance and impact of the determination rather than its form or its strictly "legal" effect. *Frozen Food Express* v. *United States,* 351 U.S. 40, 44 (1956); *CBS* v. *United States,* 316 U.S. 407 (1942).

The Commission's attempt here to resuscitate abstract categories as the test of a reviewable order, by an extensive quotation from *United States* v. *Los Angeles R.R.,* 273 U.S. 299 (1927), thus has "the hollow ring of another era." *Marine Terminal* v. *Raederi. Transatlantic,* 400 U.S. 62, 71 (1970). While the decision in *Los Angeles R.R.* was unquestionably sound on its facts—indeed, "it would be difficult to find in the books an occasion for judicial review more inappropriate and futile" than existed there (Jaffe 399)—it is highly doubtful that Mr. Justice Brandeis ever intended his language quoted by the Commission (Br. 30) to be a "complete formulary" for reviewable orders, even under the restrictive standards of the day. Jaffe 400.

If the language in *Los Angeles R.R.* were now taken as an exhaustive definition, it could not be squared

with later decisions such as *Frozen Food Express, CBS,* and *Red Lion.* See *Phillips* v. *SEC,* 388 F.2d 964, 969 (2d Cir. 1966). Abstract restrictions are especially unjustified in this case since Section 25(a) does not qualify or limit the kinds of orders subject to review. In the last analysis, as Professor Jaffe has said, "absent a clear intention to exclude review, an action which finally denies all [administrative] relief should be considered as a statutory 'order' . . . ." Jaffe 358-59.

A third requirement under Section 25(a) is that the person seeking review of an SEC order be "aggrieved," a condition often discussed in the idiom of standing. A series of decisions of this Court, culminating recently in *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970), and *Barlow* v. *Collins,* 397 U.S. 159 (1970), show that aggrievement requires nothing other than an adverse impact on protected interests of the complaining party. The impact which will suffice is not narrowly defined (397 U.S. at 153-54; 397 U.S. at 164) and certainly does not demand an agency determination which forecloses every other legal remedy for litigating the issue in question. *Frozen Food Express* v. *United States,* 351 U.S. 40 (1956); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967).

The rights asserted by the Medical Committee, in seeking to secure inclusion of its proxy proposal, are "clearly within the zone of interests protected" by Section 14(a) of the Act and Rule 14a-8. *Barlow* v. *Collins,* 397 U.S. 159, 164 (1970). Leading decisions of this Court, confirming that Section 14(a) creates "private" rights, debar any contrary argument.[26]

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[26] *J.I. Case Co.* v. *Borak,* 377 U.S. 426 (1964); *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970). *Borak* emphasized that the language of Section 14(a) itself showed its design to provide for "the protection of investors." 377 U.S. at 432.

Indeed, the legislative history of Section 14(a) makes clear the aim of Congress to protect the very right of "fair corporate suffrage" (H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934)) which the Medical Committee asserts in this proceeding. Compare *CBS* v. *United States,* 316 U.S. 407 (1942).

Measured "in a pragmatic way," *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 149 (1967), the adverse impact of the Commission's determination upon those protected interests of the Medical Committee is immediately apparent. If the Commission had determined that Rule 14a-8 did require inclusion of the proposal, there is little doubt that Dow would promptly have complied, thus vindicating the Medical Committee's interests in full without the burden and hazard of litigation. See p. 7, *supra.* Similarly if Dow had resisted, the Commission could readily itself have compelled compliance by seeking an injunction or by other means, and the Commission's action here has thus deprived the Medical Committee of "the potential benefit of the Commission's resources and expertise . . ." (A. 57).

Quite apart from what a correct determination by the Commission might have done to advance affirmatively the Medical Committee's protected interests, the determination it did make would have had a substantial harmful effect on those interests if the Medical Committee had sought relief in a District Court injunction action against Dow. Despite the Commission's disclaimers, the district courts give significant weight to the Commission's adverse actions in such situations, and on top of the other burdens the Medical Committee would carry in such a suit, that of rebutting the Commission's adverse determination could well be insupportable. See pp. 46-50, *infra.*

The fourth requirement for judicial review under Section 25(a) is that the petitioner have been a "party" to the proceeding in the Commission. Without ever squarely asserting that the Medical Committee was not a "party," the Commission's brief surprisingly seeks to create the general impression that proposing stockholders are merely casual bystanders proffering free advice to the Commission (Br. 32). Yet examination of Rule 14a-8 and the actual events in this case readily show that, assuming the course of events at the Commission level was a "proceeding," then assuredly the Medical Committee was as much a party to it as Dow itself.

It was the Medical Committee which invoked Rule 14a-8 by submitting its proposal to Dow, and that same rule required Dow to submit that proposal to the Commission when it and the Medical Committee disagreed. While the Commission says blandly that the stockholder "is not a participant in the [agency] review process" (Br. 32), the Medical Committee filed several written submissions with the staff, sought review by the full Commission, and submitted legal arguments at that level as well. At each stage, the staff and the Commission kept the Medical Committee informed of their actions just as they did Dow.[27]

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[27] In a companion assertion (Br. 32), the Commission states that the proxy rules are "directed only to the Company"; but in fact the stockholder proposal rule is in various respects "directed" to the proposing stockholder (*e.g.*, the 60-day submission requirement of Rule 14a-8(a)), and, in any event, parties to administrative proceedings are as often as not seeking to have the agency apply rules directed exclusively to someone else. As for the arid claim that the stockholder has neither a "right" nor "duty" to speak in the Commission proceeding (Br. 32), it is enough that he does and should speak and that the Commission does and should listen.

It is, in fact, common practice to describe the stockholder and management equally as parties to the Commission proceeding. Thus, in the context of Rule 14a-8, "two distinct parties compete for a favorable agency determination of conflicting interests . . . ." Note, "The SEC and 'No-Action' Decisions Under Rule 14a-8: The Case for Direct Judicial Review," 84 *Harv. L. Rev.* 835, 839 (1971). Even the Commission's own brief in the court below described the stockholder proposal dispute as a genre which involves "two interested private parties." *Id.* No language whatever in the Act or in any applicable SEC rule withholds "party" status from the Medical Committee here.

Thus, whether tested by the actual facts in this case or by common usage, the Medical Committee was a party to the proceeding. The predominant interests which Section 14(a) and the proxy rules seek to protect are stockholder interests. Most important, as already shown, since the proposing stockholder's role is central to the structure and operation of the proceeding, he is a "party" to it by the pragmatic standard which measures the meaning of review statutes in this Court. See *Lewis* v. *Labor Board,* 357 U.S. 10, 15-16 (1958).

B. Congressional Intent Is Consistent With Direct Review, and the Presumption of Reviewability Applies

Since each of Congress' express prerequisites has been met in this case, a heavy burden shifts to the party opposing reviewability. That party must demonstrate a Congressional intent, adverse to review, submerged in the legislative plan or history, or a controlling line of authority whose gloss constricts the plain language of the statute. Here, Congressional intent and the authorities support judicial review.

In deciding whether administrative action is reviewable, this Court has given great weight to indications that Congress intended to foreclose review under a particular statute, although such indications are not always preclusive. *E.g., Oestereich* v. *Selective Service System Board,* 393 U.S. 233 (1968). Conversely, Congressional silence brings into play the strong presumption, recognized by many decisions, that Congress favored reviewability. This dual canon operates strongly here to reinforce review of the SEC's determination.

Apparently the Commission concedes that nothing in the legislative history of Section 25(a) militates against review of the agency determination in this case; no evidence of Congressional intent to foreclose review has been offered. On the contrary, the hospitably broad language of Section 25(a)—and the contrast with restrictions explicit in other agency statutes p. 27, *supra*)—stresses the open-ended character of the determinations which Congress contemplated might be tested in the courts.

The legislative context here sharply contrasts with the present language and the history of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1964); and the disparity is not only illustrative but refutes the Commission's footnote analogy (Br. 38) between its determination and the largely unreviewable judgment of the NLRB's General Counsel not to prosecute complaints against unfair labor practices. That statute explicitly confers on the NLRB General Counsel "final authority" respecting "investigation of charges and issuance of complaints" (Section 3(d), 29 U.S.C. § 153(d) (1964)), and the legislative history of that

language shows that Congress intended to invest in the General Counsel an "unreviewable power." *E.g.,* 93 Cong. Rec. 6859 (1947) (statement of Senator Taft).[28]

The absence of any Congressional intent to foreclose review in the present case strongly encourages reviewability. As this Court stated in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967)—aptly described as an "over-shadowing case" on review of agency action (Davis 942 (1970 Supp.))—the rule is that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." In the present case, there is no evidence of any Congressional purpose to foreclose review, let alone the "persuasive" evidence which *Abbott* and its successors show to be necessary. See 387 U.S. at 140.

This Court's "presumption" that aggrieved persons may obtain review of administrative decisions, *City of Chicago* v. *United States,* 396 U.S. 162, 164 (1969); *Tooahnippah* v. *Hickel,* 397 U.S. 598, 606 (1970), also represents the understanding of Congress, as the APA

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[28] See Symposium, "Judicial Reviewability of NLRB Rulings," 63 *Nw. U. L. Rev.* 106, 109-10 (1968). This express evidence of Congressional intent to foreclose review is not the only distinguishing characteristic of the statute governing NLRB General Counsel's complaint determinations. See, *e.g., Lincourt* v. *NLRB,* 170 F.2d 306, 307 (1st Cir. 1948) (emphasizing that only "Board" orders are reviewable). In the era when the law concerning review of refusals to file unfair labor practice complaints hardened into its present statutory mold, there were still other obstacles to such review. *Compare Amalgamated Utility Workers* v. *Consolidated Edison,* 309 U.S. 261 (1940), *with Auto Workers* v. *Scofield,* 382 U.S. 205 (1965).

and its legislative history confirm.[29] Even more specifically, there is every reason to conclude that the very objectives that Congress sought to achieve when it enacted Section 14(a) will be fostered by reviewability of the Commission's stockholder determinations. See pp. 56-59, *infra*. Thus the overriding Congressional "purpose" that its statutes be construed to achieve legislative goals adds further affirmative support for review here. *E.g., NBC* v. *United States,* 319 U.S. 190 (1943).

C. Precedent Does Not Support the Commission's "Gloss" on Section 25(a)

Despite the evidence of Congressional intent and the presumption of reviewability, the Commission seeks to impart a limiting gloss to Section 25(a) based on allegedly applicable precedent. Relying centrally on *FPC* v. *Metropolitan Edison Co.,* 304 U.S. 375 (1938), the Commission contends that Section 25(a) embraces only "orders of a definitive character dealing with the merits" (304 U.S. at 384), and it asserts that this language precludes review in the present case. See Br. 22-24, 29.

As the Commission must be taken to have dealt "with the merits" of Rule 14a-8's application to the

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[29] See Section 10(a) of the APA, 5 U.S.C. § 702(a) (Supp. V, 1970). A relevant passage of the House Report dealing with judicial review, quoted in part in *Abbott,* states: "It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified . . . . To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of intent to withhold it." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946). See S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

Medical Committee's proposal (see pp. 17-21, *supra*), the weight of the Commission's argument hangs in the first instance upon the meaning given to the word "definitive." In the context of the *Metropolitan Edison* opinion that word was used to signify only that the administrative proceeding must be complete before judicial review can be sought. That decision rebuffed attempts to obtain review of an interlocutory "procedural" order (304 U.S. at 783) made in the course of a *still-continuing* administrative investigation, and the Court's expressed purpose was to avoid the "constant delays in the course of the administrative proceeding" which would attend the review of "mere procedural requirements or interlocutory directions . . . ." 304 U.S. at 384.[30]

Moreover, later decisions make clear that an order need not be "definitive" to be reviewable if, as the Commission suggests, that term is taken to mean a determination conclusively binding on all parties under strict *res judicata* principles. In *Abbott* itself, for example, the parties seeking review of an order prescribing regulations were entirely free to contest the legality

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[30] The Commission's attempt to convert a phrase used once in a 30-year-old opinion into a talisman for reviewability is additionally unsound because of the curious linguistic surgery it requires. The phrase relied upon occurs in a single sentence of *Metropolitan Edison*, stating that "the provision for review thus relates to orders of a definitive character dealing with the merits of the proceeding before the Commission and resulting from a hearing upon evidence supported by findings appropriate to the case." 304 U.S. at 384. The Commission itself admits that the last half of the sentence, if read as a blanket restriction, is no longer the law (see Br. 29; p. 27, *supra*); surely the author of the opinion cannot have conceived that his sentence would be scissored apart as the Commission seeks to do.

of the FDA's interpretative regulations if and when the FDA sought to enforce them. 387 U.S. at 136. See also *Frozen Food Express* v. *United States,* 351 U.S. 40 (1956); *Lester C. Newton Trucking Co.* v. *United States,* 209 F. Supp. 600 (D. Del. 1962), *aff'd per curiam,* 374 U.S. 702 (1963).

Although an order need not be irrevocably binding to be subject to review, the Commission's determination in this case *can* fairly be described as "definitive," so far as the Commission is concerned, on any realistic appraisal. While the Commission's brief asserts that "the Commission itself was not bound by that determination" and "could still bring suit against Dow" to enforce the proxy rules (Br. 30), the assertion so far as it relates to the Medical Committee's proposal requires qualification so severe as to render it inconsequent.

The supporting authorities cited by the Commission (Br. 30)—stating that the Government is not "estopped" by its agents—have in recent years usually involved cases where the federal agent's representation was induced by falsity or concealment of facts. *E.g., SEC* v. *Culpepper,* 270 F.2d 241 (2d Cir. 1959). As the law is evolving, it is by no means clear that the Commission could bring suit against Dow in the teeth of its own outstanding legal determination where, as here, there was no misrepresentation or concealment by Dow. See, *e.g., Moser* v. *United States,* 341 U.S. 41 (1950); Davis 588-90 (1970 Supp.). Be that as it may, "the reality is . . . the Commission does not depart from what is held out in a no-action letter" (*id.* at 206), as its own statements squarely confirm. See 3 Loss 1844.

The Commission finally argues that nonreviewability in this instance is supported by a consistent line of lower court decisions and the views of recognized commentators (Br. 37-38). The fact is, however, that not a single one of the cited decisions held that direct review was unavailable where a Commission determination applied Rule 14a-8 to a stockholder proposal.[31] One of the very commentators cited by the Commission recently observed that "so far as it appears no one has ever sought judicial review of a no-action letter issued by the Commission." Davis 206 (1970 Supp.).

Of the nine cases cited by the Commission only one —an unreported per curiam opinion in *Peck* v. *SEC*, No. 22,289 (2d Cir., April 7, 1952)—even involved a stockholder proposal under Rule 14a-8. There the Commission determined that a proposal directed against segregated bussing need not be included in the Greyhound Corporation's proxy statement, and the stockholder sought judicial review not of the merits of this ruling but, as the Commission accurately reported at the time, of its denial of a "request for an oral hearing" on the matter. 18 SEC Ann. Rep. 75 (1952). Among other contentions, the Commission argued in *Peck* (Resp. Mem. 15-16) that it was free to resolve

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[31] The cases cited do not even sustain the Commission's less ambitious claim that there is a governing distinction between "formal" statutory proceedings which are reviewable and "informal or advisory action" which is not (Br. 37). *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1970), itself demonstrates that the formalities are not controlling; actually, informal action taken without full procedural safeguards may sometimes call for review more urgently than formal action. 4 Davis 113. Moreover, as the court of appeals observed (A. 61), there is no bright dividing line between formal and informal action, and in any case the procedures applied in this case have the most pronounced formal aspect. See pp. 26-27, *supra*.

the issue with or without an oral hearing, and the court of appeals dismissed the appeal without opinion.

As for the commentators who are said to have "generally recognized" nonreviewability (Br. 38), the two principal authorities cited by the Commission—Professors Davis and Loss—do not appear to support its views in any discernibly direct way. The other two writers cited do assume direct review of Rule 14a-8 determinations to be unavailable but without detailed analysis and certainly without any hint of approval; quite the contrary, the Commission's own brief shows one of them to be an avid proponent of review (Br. 38) and the other is a fierce critic of the SEC's administration of Rule 14a-8. See p. 58, *infra*. More to the point, the decision of the court below, made in the context of this Court's recent decisions on reviewability, has already received substantial and reasoned approval from commentators today.[32]

The cramped reading of Section 25(a) urged by the Commission is, finally, not consistent with the expansive approach taken by this Court in *J.I. Case* v. *Borak*, 377 U.S. 426 (1964). There this Court read broadly other remedial provisions of the Act, including Section 27, 15 U.S.C. § 78aa (1964), to sanction private damage actions for violation of the proxy rules. Surely if federal causes of action may be *implied* to vindicate stockholders' rights under the Act, there is no basis

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[32] See Note, "The SEC and 'No-Action' Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review," 84 *Harv. L. Rev.* 835 (1971); Note, "Medical Committee for Human Rights v. SEC: Judicial Review of SEC No-Action Determinations Under the Proxy Rules," 57 *U. Va. L. Rev.* 331 (1971); Case Comment, 45 *N.Y.U.L. Rev.* 1098 (1970); Recent Case, 24 *Vand. L. Rev.* 387 (1971); Recent Decision, 20 *American U. L. Rev.* 190 (1970).

for curtailing the express protection which Section 25(a) affords to the same rights of stockholders by assuring them direct judicial review.[33]

III. THE COURT OF APPEALS IS THE MOST APPROPRIATE FORUM FOR REVIEW OF THE COMMISSION'S LEGAL DETERMINATION, AND AN INJUNCTION SUIT IN THE DISTRICT COURT DOES NOT AFFORD STOCKHOLDERS AN ADEQUATE REMEDY.

A. The Court of Appeals Is the Most Appropriate Forum

The lower court here concluded that, judged "by every substantial consideration," direct review of the Commission determination in the court of appeals was a more appropriate method of review than an indirect attack, made in the Commission's absence, through an injunctive suit against management in the district court (A. 64). This consideration is properly relevant where a court is construing a statute "governing the distribution of judicial responsibility," *Swift & Co.* v. *Wickham*, 382 U.S. 111, 124 (1965), and the lower court's appraisal is accurate.

The substantive issue posed in the court of appeals in this case, as in the normal dispute under Rule 14a-8, was a legal one involving the correctness of the Commission's interpretation of an agency regulation having the force of law. Had the Commission made an identical interpretation, in a proceeding to delist Dow for violation of Rule 14a-8 or through a formal declaratory

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[33] *Borak* is not the only decision affirming that the securities laws deserve a broad construction. *E.g.*, *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967); *SEC* v. *Capital Gains Bureau*, 375 U.S. 180, 195 (1963). In the latter case, this Court stated that securities legislation should be interpreted "not technically and restrictively, but flexibly to effectuate its remedial purposes."

order in a full-fledged adjudicative proceeding, the same issue could unquestionably have been brought directly to the court of appeals under Section 25(a). As Professor Jaffe has said, "Presumptively the forum appropriate for review of the usual order is equally appropriate for other agency orders." Jaffe 358.

Under Section 25(a), it was patently Congress' intent that Commission determinations be reviewed in the courts of appeals. See S. Rep. No. 1455, 73d Cong., 2d Sess. 77 (1934). A comparable view was taken by the Congress when in the Judicial Review Act of 1950, 28 U.S.C. § 2341-52 (Supp. V, 1970), it provided uniform review in the court of appeals for orders of several different departments and agencies. The House Report there stated that review of agency determinations in the courts of appeals rather than in the district courts "is the more modern method and is generally considered to be the best method for the review of orders of administrative agencies." H. R. Rep. No. 2122, 81st Cong., 2d Sess. 4 (1950).

The courts of appeals are fully experienced in resolving legal issues attending agency action and inevitably provide a swifter, more efficient and less expensive forum for such review. These considerations would not be irrelevant if merely the litigants' private interests were at stake (see Fed. R. Civ. P. 1); but in Rule 14a-8 controversies the availability of court of appeals relief may well be the difference between sustaining stockholder rights under the rule or their abandonment. After the Commission has acted on a stockholder proposal dispute, only a few weeks or even days usually remain before management must print

and distribute its proxy material.[34] If at that stage the stockholder must begin an independent action in the district court, it is almost impossible for him to obtain timely relief in the face of the Commission's adverse determination and other practical and legal barriers. See pp. 46-50, *infra*.

When these realities are understood, there is a certain irony in the Commission's argument that the district court is a more appropriate forum because only there can a stockholder obtain mandatory relief against management (Br. 44). In practice management almost always accepts the determination of the Commission, and such mandatory relief is totally unnecessary. See p. 7, *supra*. It is noteworthy that as soon as the court of appeals expressed its view that the Medical Committee's proposal was not excludible under Rule 14a-8, Dow voluntarily included the proposal in its next proxy statement even though the court had merely remanded the case to the Commission for further explanation of the agency's views.

The experience of recent years is fair evidence that requiring resort to the district court injunction suit, described by the Commission as affording full relief (Br. 42-44), is likely to result in the stockholder's abandoning the matter and obtaining no relief at all. It can hardly be accidental that, while almost 900 stock-

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[34] Due to the interrelationship of the timing provisions of the proxy rules, management is not required to decide whether it will include or exclude a stockholder's proposal until approximately four weeks before it intends to distribute its proxy statement. Rules 14a-6(a), 14a-8(d). It is not until that point that the management must submit the matter to the Commission's staff. In this case the Commission itself did not enter its minute until several days after Dow planned to distribute its proxy materials (A. 22, 44).

holder proposals were rejected in a 15-year period ending in 1969, only three district court actions appear even to have been attempted.[35] In none was the stockholder successful.

If there are rare cases where efficiency will be served by an injunction suit in the district court rather than direct review in the court of appeals, then the stockholder himself has every reason to pursue that route.[36] In the usual case, where direct review would be sought by the stockholder, a prudent management which was irrevocably opposed to including the stockholder proposal would intervene in the court of appeals proceeding and contest the issue there. See Fed. R. App. P. 15(d). The argument made by the Commission is, in substance, little different than that which was made by it and rejected many years ago in *American Sumatra Tobacco Corp.* v. *SEC*, 93 F.2d 236, 241 (D.C. Cir. 1937), where the court said:

> "The alternatives [to direct review] suggested by the Commission, that petitioners may seek relief outside the Act by a suit in equity for an in-

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[35] See 22-35 SEC Ann. Reps. (1956-1969). Those cases are *Brooks* v. *Standard Oil Co.*, 308 F. Supp. 810 (S.D.N.Y. 1969); *Curtin* v. *AT&T*, 124 F. Supp. 197 (S.D.N.Y. 1954); and *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951).

[36] See, *e.g.*, *Mougios* v. *W. R. Grace & Co.*, CCH Fed. Sec. L. Rep. ¶ 93,038 (S.D.N.Y. 1971). The Commission's discussion (Br. 44 n.42) of the subsequent direct review proceeding now pending in the Second Circuit, *Mougios* v. *SEC*, No. 71-1438, implies that an ultimate court of appeals determination that the Mougios proposal was wrongfully omitted would have to be followed by further district court litigation to compel Grace to include the proposal in the next proxy statement. Given the court of appeals determination, the likelihood that such follow-up litigation would be needed is, of course, highly remote.

> junction . . . would result in equal inconveniences and would constitute circuitous routes for the determination of issues easily and directly determinable by review in this court."

B. The District Court Injunction Suit Is Not an Adequate Remedy

As already noted, time is usually short when management first determines to reject a stockholder proposal and is even shorter when the staff and the Commission have made their own determination. See p. 44, *supra*. Apparently the Commission believes that the stockholder is not aggrieved by its determination nor denied an adequate remedy since at this late stage, after having made a full submission to the staff and Commission, the stockholder can theoretically bring an independent action in the district court against the company's management. The realities tell a different story.

As a preliminary matter, the stockholder would have to bring his original action in the district where the company may be found or transacts business (Section 27 of the Act, 15 U.S.C. § 78aa (1964)) rather than in the circuit where the stockholder himself resides or in the District of Columbia circuit, as Section 25(a) provides. Then, he would have to persuade the district judge to dispense with pretrial discovery and, on a summary basis, issue an injunction that would irrevocably resolve the controversy. These measures are not encouraged by the appellate courts, and the alternative of postponing the company's annual meeting *pendente lite* is still less likely to appeal to the district judge. *E.g., Mougios* v. *W.R. Grace & Co.*, CCH Fed. Sec. L. Rep. ¶ 93,038 (S.D.N.Y. 1971).

On the merits, in the district court the stockholder may be faced with demands that he establish not only a violation of Rule 14a-8 but irreparable injury and other requisites often required for injunctive relief (*e.g., Curtin* v. *AT&T*, 124 F. Supp. 197, 198 (S.D.N.Y. 1954)); in a statutory review proceeding in the court of appeals, only the violation need be shown. Jaffe 418. Lastly, the stockholder would have to persuade the district judge, quite possibly inexperienced with SEC practice, to disregard what the judge will frequently and rightly regard as the SEC's expert judgment that the proxy rules will not be infringed by omission of the proposal. See, *e.g., Brooks* v. *Standard Oil*, 308 F. Supp. 810, 813 (S.D.N.Y. 1969).

Contending that the exhaustion of remedies doctrine does not apply when the agency cannot grant "full relief," the Commission's brief argues that the stockholder need not await its determination before seeking an injunction (Br. 33). Yet as a practical matter the Commission can afford the stockholder full relief in most cases (see p. 7, *supra*), and the courts apply the exhaustion doctrine not by generalities but on a case to case basis.[37] Even a complete exemption from the doctrine would do little to relieve the time pressure or facilitate district court relief. Courts would rarely find a justiciable controversy until management actually rejected the proposal, and some judges would

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[37] See 3 Davis 97-100. The principal decision relied upon by the Commission, notably *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192 (1944), involved fact situations in which the possibility of any relief, let alone full relief, was so remote that comparison with the present facts is unthinkable. The only decision squarely in point involving a stockholder proposal under Rule 14a-8 did, of course, require that the stockholder exhaust his agency remedy. *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951).

refuse to act until a decision had been made by the Commission staff under Rule 14a-8(d).

Whether or not the exhaustion doctrine applies *ex proprio vigore,* the Commission's suggestion that its processes be sidestepped is highly perplexing. A stockholder proposal dispute submitted to the Commission may be resolved at the agency level, sparing both party and courts the time and expense of litigation. Sometimes, indeed, the Commission effects intermediate solutions which neither side has advanced.[38] In short, a court would properly look askance at a stockholder who accepted the Commission's present suggestion and brought a district court suit "without even complaining to or consulting the Commission" (Br. 32-33).

It is equally an oversimplification for the Commission to assert that the district courts are "at least as qualified" as the Commission to pass on such controversies in the first instance (Br. 42-43) and that the courts should not accord "any weight" to proxy rule determinations such as it made here (Br. 34-35). An agency's interpretive judgment on any issue does not automatically require or forbid the deference of a reviewing court according to blanket rule. Instead,

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[38] The staff may respond to a disputed proposal by informing both parties that it views the proposal as includible under Rule 14a-8 if, but only if, certain modifications are made to take the proposal outside of specified exclusions. The Commission made such a determination in March 1970 with respect to proposals submitted for the General Motors Corporation proxy statement, and the stockholder accepted the limitations and eschewed litigation. See Schwartz, "The Public Interest Proxy Contest: Reflections on Campaign GM," 69 *Mich. L. Rev.* 419, 451-54 (1971). The Commission staff made a similar determination in April 1971 in connection with proposals submitted to Fidelity Fund, Inc. BNA Sec. Reg. & Law Rep., May 12, 1971, p. K-1.

the weight given an agency determination turns on the particular circumstances, including the care given to it by the agency, the reasoning, its consistency with other agency pronouncements and "all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

Naturally no weight should be given in a subsequent proxy fraud suit to the Commission's mere inaction on a proxy statement where facts were not disclosed to it. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432-33 (1964). It does not follow, however, that the Commission's views deserve no weight where a deliberate judgment was made on known facts, and the lower courts, with varying degrees of qualification, have given weight to those views in numerous cases.[39] Because Rule 14a-8's formal procedures channel disputes and bring them to the Commission's attention, the courts are especially likely to give weight to Commission action on them, absent a clear showing of error such as a conflict with past rulings or a departure from legislative purpose.

De novo review of stockholder proposal disputes by the district courts is not made either more likely or more appropriate by the Commission's assertion that

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[39] *E.g.*, *Brooks* v. *Standard Oil Co.*, 308 F. Supp. 810 (S.D.N.Y. 1969) (Rule 14a-8); *Union Pacific R.R.* v. *Chicago & N.W. Ry.*, 226 F. Supp. 400 (N.D. Ill. 1964) (Rule 14a-9); *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951) (Rule 14a-8); *Leighton* v. *One William Street Fund, Inc.*, CCH Fed. Sec. L. Rep. ¶ 91,561 (S.D.N.Y. 1965) (Rule 14a-9). See Aranow & Einhorn, *Proxy Contests for Corporate Control* 467 (1968); Loss, "The SEC Proxy Rules in the Courts," 73 *Harv. L. Rev.* 1041, 1065 (1960). As the court said in the *Leighton* case (at p. 95, 122), which the Commission itself cites on this issue (Br. 34), a proxy rule interpretation by the Commission is entitled to "great deference" but is not conclusive upon the court.

"questions of state law" are "frequently critical" under Rule 14a-8 (Br. 43). The familiar truth is that precedents on state law, nominally relevant to the "proper subject" exclusion, are "generally nonexistent" so that the Commission has long "been building up a 'common law' of its own" to resolve such questions. 2 Loss 906.[40] Indeed, since the Commission has generally failed to disclose its determinations under Rule 14a-8, the benefits of its accumulated experience can be had only by initial resort to the Commission.

It is therefore clear that stockholder proposals normally ought to be taken to the Commission initially and that the courts have and will regard its determinations as carrying weight. Although this barrier to injunctive relief is substantial, the courts of appeals on direct review are themselves likely to give weight to Commission views. The difference is that in the court of appeals the Commission will be a party, will generally explain its grounds, and will thus permit the reviewing court to judge its position on its merits; but the district court, where the Commission need not appear, will normally be faced with the unexplained fact of a Commission determination and as experience has shown will rarely be prepared to disregard it on a summary basis.

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[40] The Commission's brief also suggests that factual issues outside the Commission's ken may sometimes be involved in three other exclusions, including the "general cause" exclusion of Rule 14a-8(c)(2). See Br. 43. The Commission has been applying the "general cause" exclusion for some years without intimating that an oral examination inquiring into the stockholder's subjective intent was needed (compare p. 48 n. 38, *supra*), and such an approach would render the rule virtually unworkable. The other two exclusions adverted to as sometimes requiring factual determinations are presumably those of Rules 14a-8(c)(3) and (4); the kinds of "facts" relevant to those rules are reflected in the minutes of the stockholders' meeting and are not likely to be in dispute in the normal case.

Quite apart from the inadequacy of district court relief for the aggrieved stockholder, it should be observed that there is no reason why such a remedy, even if it were far more adequate than it is in fact, should preclude review under Section 25(a). The latter section, after all, is the statutory remedy prescribed by Congress. If statutory prerequisites are satisfied, as they are here, it is not customary to require a litigant to forego direct review in favor of an original action in the district court. *Environmental Defense Fund, Inc.* v. *Hardin,* 428 F. 2d 1093, 1098-99 (D.C. Cir. 1970); *American Sumatra Tobacco Corp.* v. *SEC,* 93 F. 2d 236, 241 (D.C. Cir. 1937).

IV. DIRECT JUDICIAL REVIEW WILL NOT IMPOSE A SIGNIFICANT BURDEN ON THE COMMISSION, AND SUCH REVIEW WILL IMPROVE EXISTING ADMINISTRATION OF RULE 14a-8.

A. No Significant Burden Will Result From Judicial Review

In a final argument against direct judicial review, the Commission frankly invokes considerations of expediency and contends that a heavy burden will be cast upon the agency if such review is allowed (Br. 45-48). As judges have often noted, such predictions of administrative disruption, frequently made in opposing reviewability, "are rarely borne out in practice." *Office of Communication of United Church of Christ* v. *FCC,* 359 F. 2d 994, 1006 (D.C. Cir. 1966). The court below was correct in finding these "grim forebodings" unjustified in this case (A. 69).

By its own terms, the decision below applies only to stockholder proposal disputes, and they constitute a very small segment of the SEC's business, even as a proportion of matters arising under the proxy rules. While the Commission processes over 5,500 proxy statements a year (Br. 47), in its most recent fiscal

year only 35 stockholder proposals were excluded under Rule 14a-8 (36 SEC Ann. Rep. 47 (1970)); in fact, the number of excludible proposals has actually decreased in the past several years. Compare, *e.g.*, 34 SEC Ann. Rep. 42 (1968) (74 proposals excluded). The number of contested proposals found includible is harder to determine but does not appear to be large.[41]

Of the limited number of proposals actually contested in the agency, only a minority of disappointed stockholders are likely to have the interest or resources to seek judicial review, while disappointed managements have even less reason to challenge the Commission's determination. See p. 7, n. 6, *supra*. Therefore, the "burden" that judicial review would cast upon the Commission is essentially that of explaining its determination in court in only a handful of cases a year, and even these are likely to decrease once governing precedents are established by the decisions.[42]

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[41] The two annual reports cited above show, for example, that 241 stockholder proposals submitted by 25 stockholders were included in 1970 and 162 submitted by 34 stockholders were included in 1968. There is no indication how many of these proposals were protested by management; and management's objection, even where made, would often be *pro forma* since it can often muster a large majority of the proxies and vote the proposal down.

[42] The Commission's brief suggests that the court of appeals "contemplates" a "more formal decision-making process" at the agency level (Br. 46), but the lower court explicitly disclaimed any intention to meddle in the Commission's "internal management," and its review was confined to the merits rather than the method of the Commission's determination (A. 68). At most, the Commission may sometimes be called upon to reconsider its determination and reveal its reasons, as the court of appeals did here in the face of an inexplicable result. The burden of this task is not apparent, especially since the staff appears to prepare memoranda on troublesome cases in any event (A. 44).

Where the Commission exercises sound judgment in making its initial determinations, the prospect of litigation is even more slight. If an occasional frivolous appeal is pursued, the burden of defense cannot be heavy, and the appeals courts are well equipped to deal shortly with such claims. It is noteworthy that the SEC has, among agencies, a relatively slight load of court litigation (see 6 Loss 4055) and finds time to appear not infrequently as an *amicus curiae* in private litigation raising significant issues. 3 Loss 1935; 6 Loss 4071-72.

While judicial review will impose no unmanageable burden, it is not amiss to note that the Commission's processes are within its own control and that it is not obliged to rule on stockholder proposals either itself or through its staff.[43] There are certainly good reasons why it should continue to do so, subject to limited review in the courts of appeals. Its present posture, however, gives the stockholder the worst of both worlds: an adverse determination severely hobbles him in the district courts, while the Commission resists review of that determination in the courts of appeals.

In actuality, the thrust of the Commission's burden argument is not that it would be disabled by review limited to stockholder proposals; instead its brief suggests that, by a kind of "domino" theory, direct judicial review would necessarily be extended to the far larger number of no-action letters dealing with stock registration and with proxy matters other than those

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[43] As earlier noted, the question whether staff determinations standing alone would be reviewable is basically academic at present (see p. 17, n. 14, *supra*), and the Commission in all events controls its staff. There is, however, little to the Commission's intimation (Br. 47) that a line between Commission and staff action could not be drawn, if a court chose to do so. See A. 69.

arising under Rule 14a-8. However, these determinations are not fungible with those made under Rule 14a-8, but differ both in substance and procedure. Given reviewability of stockholder proposal determinations, it is safe to predict that the Commission will not be long in advancing the very plausible distinctions between the different categories.

The largest of the categories, apparently embracing about three-quarters of the 5,000 or so no-action letters issued annually by the SEC, represents staff or Commission determinations as to whether a stockholder or company may sell stock without registration.[44] By contrast to Rule 14a-8 determinations, there is no requirement that the selling stockholder submit the matter to the Commission. There is rarely an adversary interest. The staff acts by applying broad-gauge uncodified standards to a particular set of alleged facts. See p. 54, n. 44, *supra*. In sum, the method and substance of decision bear little resemblance to the typically adversary determination under Rule 14a-8, governed by detailed procedures and made pursuant to codified regulatory standards readily amenable to judicial review.

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[44] See W. Lockhart, *Report on Study of No-Action Letters and Related Advisory Processes, Administered by the Division of Corporation Finance, Securities and Exchange Commission* 1-3 (undated report prepared for U.S. Administrative Conference). The registration in question is that required by the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1964), which forbids sales of stock not registered with the Commission, subject to a series of exemptions. Most of the no-action letters on this issue involve the so-called "underwriter" exemption which the Commission applies to the facts of each case through a number of inchoate criteria such as "investment intent" and "change of circumstances." See F. Wheat, *Disclosure to Investors* 160-78 (1969) (prepared for the SEC by Commissioner Wheat).

No-action letters concerning issues arising under other proxy rules, such as Rule 14a-9 which forbids false and misleading statements, are similarly distinguishable. Again, the matter is likely to turn on a complex of unique facts which are, as the Commission suggests, themselves merely assumed *arguendo* (Br. 22-23). In these cases, also, the adversary interest is normally absent. When such an interest is present, as in proxy contests, the Commission may decline to intervene "as a matter of policy" absent the most serious abuse. *1956 Hearings* 1552 (testimony of Chairman Armstrong).[45]

In seeking to elide these distinctions between stockholder proposal determinations and other no-action letters the Commission is in substance asking the Court to decide one case on the facts of another. However such "opening wedge" arguments may be phrased, review of stockholder proposal determinations neither implies nor compels review of other types of Commission action taken pursuant to different procedures, and judges are entirely competent to draw the necessary lines. *Compare,* for example, *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), *with Toilet Goods Ass'n* v. *Gardner,* 387 U.S. 158 (1967).

In *Abbott* itself, the Food and Drug Administration resisted direct judicial review by making essentially the same "burden" arguments urged here by the Commission. The FDA's brief devoted several pages

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[45] As Chairman Armstrong explained, both sides in proxy contests are normally able to reply in kind or seek legal redress on their own. The Commission does not like to inject itself into election contests, and it is unwilling to take steps which, by postponing an election, may actually disenfranchise stockholders. *Id.* 1551-52.

to minatory predictions concerning the "very heavy burden on the agency" that would result from judicial review and the prospect that review would "seriously impair the effectiveness of the statute." Resp. Br. 32-34. This Court responded that courts are well equipped to confine judicial review within manageable bounds (387 U.S. at 154-55), and of course the collapse of the FDA has not materialized.

B. Judicial Review Will Improve Administration of Rule 14a-8

The benefits of direct judicial review of stockholder proposal determinations are at once more numerous and more concrete than any inconveniences which review might work upon the Commission. If broad prudential considerations are relevant even where statutory prerequisites have been met, as the Commission here supposes, those considerations argue strongly in favor of review in this instance.

Judicial review will, most immediately, assist the proposing stockholder, together with all other stockholders, by assuring that wrongly excluded proposals are restored to the proxy statement and subject to vote at the meeting. Such review will also diminish the risk that the Commission will persist in an erroneous legal interpretation which, in the absence of judicial oversight, might plague proposing stockholders for years. Consequently, direct judicial review serves the very interest in "fair corporate suffrage" at which Congress aimed in enacting Section 14(a) and which this Court sought to protect in *J. I. Case* v. *Borak*, 377 U.S. 426 (1964).

Moreover, stockholder proposals tend to have a "healthy" impact on the corporations themselves.

2 Loss 910. Over the years the proposals have aimed at a wide variety of reforms ranging from now familiar achievements, such as independent auditors and reports to stockholders, through significant structural improvements in mutual fund administration. See Emerson & Latcham, "The SEC Proxy Proposal Rule: The Corporate Gadfly," 19 *U. Chi. L. Rev.* 807 (1952); p. 48, n. 38, *supra*. Proposals rejected at first have often been accepted over time, sometimes by voluntary choice of management.[46]

Moreover, "the very opportunity to submit proposals . . . affords a safety valve for stockholder expression" at a relatively slight price. 2 Loss 910. The values of free expression thus implicit in effective operation of Rule 14a-8 have been recognized by the courts in other circumstances, and reinforced by judicial review, even when those values are ultimately implemented through the action of private enterprises. *Cf. Public Util. Comm'n* v. *Pollak,* 343 U.S. 451, 462 (1952); *Banzhaf* v. *FCC,* 405 F. 2d 1082, 1101 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

There is, lastly, another beneficiary of judicial review, and that is the agency itself. It is natural that officials called upon to explain agency action in court should describe judicial review as a burden. Yet, when

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[46] Two of the proposals at issue in the original *Transamerica* litigation were eventually adopted by management without ever being submitted to a stockholder vote. See 14 SEC Ann. Rep. 54 (1948). More recently, General Motors Corporation after two stockholder proposals had been defeated at its annual meeting adopted on its own initiative other reforms looking in the same general direction. See Note, "Liberalizing SEC Rule 14a-8 Through the Use of Advisory Proposals," 80 *Yale L.J.* 845, 850 (1971).

properly confined by due respect for agency judgment and comparable limitations on the scope of review, judicial review so limited "does not weaken the administrative process but strengthens it," because the courts have their own skills to contribute "to accomplishment of administrative objectives." 4 Davis 112-13.

As the lower court here intimated, the Commission itself may possibly profit from judicial guidance in its own administration of Rule 14a-8. The Commission is doubtless correct in asserting that its proxy rule methods have in general been highly commended by the commentators (Br. 12). Yet it has also been suggested that the SEC's administration of Rule 14a-8 has not been as effective as it might be, either in administrative process or the substance of decisions.

The most detailed study available of the Commission's actual administration of the stockholder proposal rule was made by a former attorney-advisor in the Division of Corporation Finance, who was familiar with and referred in his study to many of the decisions made by the staff and the Commission. Clusserath, "The Amended Stockholder Proposal Rule: A Decade Later," 40 *Notre Dame Lawyer* 13 (1964). His lengthy analysis, adverted to by the lower court (A. 67), leveled numerous criticisms at the SEC's handling of Rule 14a-8 determinations, including "inconsistent administration," "poor substantive law," and "failure fully to inform outsiders" of its prior determinations. *Id.* at 39-42. See also 5 Loss 2860.

On a substantive plane, there has been counterpart criticism of the increasing number of exclusions introduced into the stockholder proposal rule and their in-

terpretation by the Commission.[47] Whatever the merits of these criticisms, certainly the views of the courts on questions of law and on the Congressional purpose underlying Section 14(a) can only serve to improve the agency's own effectuation of the rule. In fact, since the lower court's decision, the SEC has undertaken to "reconsider" its substantive rules relating to stockholder proposals (statement of Chairman Budge, BNA Sec. Reg. & Law Rep., Nov. 11, 1970, p. A-3), and only direct court of appeals review is likely to produce such results. Note, "The SEC and 'No-Action' Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review," 84 *Harv. L. Rev.* 835, 856 (1971).

To recognize that direct judicial review of Commission determinations under Rule 14a-8 is not likely to be frequent, so long as the agency exercises sound judgment, in no way detracts from the benefits of review. Availability of review itself encourages care by the agency, and a single court of appeals' decision may provide guidance that will enable the Commission's staff to dispose properly of countless cases that follow

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[47] See Bayne, Caplan, Emerson Latcham, "Proxy Regulation and the Rule-Making Process: The 1954 Amendments," 40 *Va. L. Rev.* 387 (1954); Note, "Proxy Rule 14a-8: Omission of Shareholder Proposals," 84 *Harv. L. Rev.* 700 (1971). Starting with the initial codified rule in 1942, allowing proposals on any "proper subject" for stockholder action (Sec. Ex. Act Rel. No. 3347 (Dec. 18, 1942)), the chronology of major limitations and refinements includes: "the general cause" exclusion first announced in 1945 (Sec. Ex. Act Rel. No. 3638 (Jan. 3, 1945)) and now codified as Rule 14a-8(c)(2); an exclusion for "personal grievances" now included in the same rule, and limitations on previously made proposals which were not acted upon or were defeated, now codified in Rules 14a-8(c)(3) and (4) (Sec. Ex. Act Rel. No. 4185 (Nov. 5, 1948)); an exclusion for recommendations concerning the company's "ordinary business" operations now in Rule 14a-8(c)(5) (Sec. Ex. Act Rel. No. 4979 (Jan. 6, 1954)); and an exclusion for "counter-proposals" to matters submitted by management inserted in Rule 14a-8(a) (Sec. Ex. Act Rel. No. 8206 (Dec. 14, 1967)).

at the administrative level. Such a calibrated interplay of court and agency is one of the prime purposes of judicial review. See *FCC* v. *RCA Communications,* 346 U.S. 86, 91 (1953); *Attorney General's Report* 76-79.

In the last analysis, however, judicial review is called for in this case not because of any one of its benefits, but rather because it conforms to the bedrock principle of our legal system expressed by this Court in *Abbott:* absent a contrary Congressional intent, final agency action which adversely affects protected interests of citizens should be subject to the scrutiny of the courts. "For just in so far as administrative determinations are subject to court review, a means exists for maintaining the supremacy of law, though at one remove and as a sort of secondary line of defense." J. Dickinson, *Administrative Justice and the Supremacy of Law in the United States* 37 (1927). See L. Fuller, *The Morality of Law* 81 (1963).

CONCLUSION

For the reasons stated, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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September 1971

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JAN 30 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1162~~ 70-61

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Respondent

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1162

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

It is the position of respondent, the Medical Committee for Human Rights, that the instant petition for certiorari should be denied. We believe that petitioner has misunderstood certain of the basic facts in the present case and as a result has misconceived the nature and the importance of the sole issue—one of judicial review of administrative action—for which review is sought.

QUESTION PRESENTED

Where a dispute has arisen between a corporation and a shareholder as to the proper legal interpretation of the SEC's Proxy Rules relating to the inclusion of shareholder proposals in corporate proxy materials, and where the mandatory rules of the SEC require the parties to such a dispute to bring the matter before the agency for its consideration, and where the five-man Commission has then voluntarily chosen to review the matter and has apparently endorsed the legal position taken by the company, rejecting the legal arguments of the shareholder, was it error to hold that the Commission's action was subject to judicial review by the United States Court of Appeals for the District of Columbia?

COUNTERSTATEMENT

A. THE TYPE OF COMPANY-SHAREHOLDER DISPUTE INVOLVED

The petition for certiorari is very clearly designed to create the impression that the Securities and Exchange Commission handles thousands of corporate "proxy" problems every year (the petition says 5,300 in 1969), that the Court of Appeals below has held that the agency's handling of every one of these thousands of proxy problems is now to be subject to judicial review, that the ruling below thus foreshadows a veritable avalanche of "unnecessary appellate litigation," and that this Court must now step in to stop the avalanche before it gets started.

This is a highly inaccurate portrayal of this case. It is a fact, as the petition emphasizes, that whenever a corporation has prepared a proxy statement to be mailed out to its shareholders in advance of the company's annual meeting, the SEC requires the company to submit its proxy materials to the agency in advance for the agency's review under certain "informal procedures" which have been adopted for that purpose. It is no doubt also true that in the year

1969 "more than 5,300 proxy statements" were reviewed by the agency under these informal procedures (see Pet. 15). But these propositions have nothing to do with this case. This case simply does not involve the SEC's ordinary, informal review of corporate proxy materials, and the decision below by its own terms precludes any notion that there should be judicial review of such administrative action.

The problem involved in this case can arise only on those relatively rare occasions when a shareholder submits a proposal to management with a request that management include his proposal in the corporate proxy materials which are to be distributed to all shareholders before a corporate meeting. Long ago the SEC recognized that, if individual shareholders were going to have an effective voice in the affairs of their companies, it was important that corporate managements honor such requests and include such shareholder-proffered proposals in management's proxy materials. Accordingly, in order to bring about "a revitalization of the democratic process in the conduct of corporate affairs,"[1] the SEC years ago promulgated a set of proxy rules which require corporate management to include *every* shareholder proposal in management's proxy materials unless the proposal falls within certain limited exceptions delineated in the Proxy Rules. As further explained below, this case arises because (a) a shareholder (the Medical Committee) submitted a proposal to a company (Dow Chemical Company) for inclusion in the company's proxy materials and (b) the company refused to include the proposal, rejecting the shareholder's legal arguments to the effect that as a matter of law inclusion was required.

Before considering the administrative action thereafter taken in this dispute, it is important to note the frequency with which such matters come before the SEC. According to the Commission's Thirty-Fifth Annual Report, 47 (1969) —the same report which indicates that the SEC reviewed

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[1] SEC Tenth Annual Report, *A Ten-Year Survey*, 31 (1944).

5,300 proxy statements in 1969—in that year a total of no more than 137 companies received proposals from their shareholders. In 118 of those cases the company agreed to include the proposals in its proxy materials, and in only 19 cases were the proposals omitted. Moreover, it appears that in many of those 19 cases the shareholder proposals were omitted from the proxy materials because the shareholder himself voluntarily withdrew them—leaving, from among those 19 cases, only a handful (probably less than ten in 1969) in which an actual deadlock arose between the shareholder and management. The SEC's method of handling these rare confrontations is described below.

B. THE MANDATORY PROCEDURES ESTABLISHED BY THE SEC FOR THE HANDLING OF SUCH DISPUTES

Although it is true, as petitioner has repeatedly emphasized, that the SEC has established what it describes as "informal procedures" for its regular review of corporate proxy materials (Pet. 8-9, 15), those "informal procedures" are *not* applicable to company-shareholder disputes of the kind here involved and were not followed in this dispute. On the contrary, because of the importance of the right of a shareholder to have his views included in management's proxy materials, the SEC has established what it itself describes as "formal" and mandatory procedures which are specially designed to deal with the rare situation in which a corporate management flatly refuses to accept a shareholder proposal for inclusion in its proxy materials. These self-described "formal procedures"[2] are as follows:

1. The Proxy Rules require that, whenever the management of a corporation decides to exclude a proffered shareholder proxy proposal, management *must* submit the proposal and supporting papers "as received from the security holder" to the SEC's Division of Corporation

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[2] 17 C.F.R. § 202.1(a), (b), (c).

Finance, together with the opposing views of management and an opinion of counsel setting forth the legal justification for management's position where that position is "based on matters of law." Rule 14a-8(d), 17 C.F.R. §240.14a-8(d). In the instant case, when the Medical Committee submitted its proposal to Dow, Dow complied with this requirement (R. 9a-13a, 18a-19a).

2. The SEC Proxy Rules require that the parties' position papers be filed with the Division of Corporation Finance not later than 20 days *prior* to the date on which preliminary copies of the proxy materials are filed with the agency for routine review, so that the agency "will have more time to consider the problems involved in such cases . . . ." Sec. Ex. Act Rel. No. 4979, 19 Fed. Reg. 246 (1954). Dow complied with this requirement. (R. 9a-13a, 18a-19a).

3. The Proxy Rules require management to notify the shareholder of its action and serve the shareholder with copies of the materials filed with the SEC. Dow complied with this requirement (*Id.*).[3]

4. When the matter is thus submitted to the agency under the foregoing mandatory rules, "the burden of proof" is "upon the management to show that [the shareholder's] proposal is not a proper one for inclusion in management's proxy materials." 19 Fed. Reg. 246 (1954).

In the instant case the sole issue between the Medical Committee and Dow was a purely legal issue as to the interpretation of the SEC's own Proxy Rules—namely, whether the proposal of the Medical Committee fell within or without one or more of the legal exceptions which, under the Rules, would justify management in excluding the proposal (R. 9a-13a, 18a-19a, 26a-32a, 38a-39a). Both the Medical Committee and Dow submitted legal argument to the SEC on that pure question of law. (*Id.*)

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[3]The petition implies that in this case the parties' papers were submitted to the SEC simply because the Medical Committee so requested (Pet. 3), whereas in fact Dow was required to submit the papers to the agency, whether the Medical Committee so requested or not.

It should be emphasized that when such disputes are brought before the agency, they are normally handled solely by the staff of the Commission (specifically, the Division of Corporation Finance), rather than by the five-man Commission itself. The Commission is under no legal obligation, either under its own rules or otherwise, to pass judgment on such disputes, and it normally does not do so. Ordinarily the Commission will consider the matter only if the particular case seems to be one of unusual importance.[4] As indicated immediately below, the instant case seems to have been so considered by the Commission. Had it not been, judicial review would not (as explained below) have been available.

C. THE ACTION TAKEN BY THE AGENCY IN THIS CASE

Included within the papers which Dow was required to (and did) file with the SEC's Division of Corporation Finance was an opinion of Dow's counsel to the effect that, under his reading of the SEC's Proxy Rules, it was lawful for Dow to exclude the Medical Committee's proposal from the company's proxy materials. On February 18, 1969, the Division of Corporation Finance explicitly endorsed the legal position taken by Dow's counsel, informing Dow by letter that the Division would not recommend any action against Dow "for reasons stated in your letter and the accompanying opinion of counsel" (R. 20a). Thereafter the five-man Commission, although it rarely does so, also decided to consider the matter. Its decision in this case was to accept and *approve* "the recommendation of the Division of Corporation Finance" (R. 44a-45a, 46a).[5] As pointed out in the

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[4] The petition apparently concedes the rarity of action by the Commission itself. Set Pet. 8.

[5] The petition says that "the Commission did *no more* than indicate it would not take enforcement action if Dow declined to include the proposal" (Pet. 11, emphasis added), but that statement is not precisely correct. The Commission explicitly indicated that it had "approved the recommendation of the Division of Corporation Fin-

unanimous opinion of the Court of Appeals below, it is apparent that the legal position taken by Dow's counsel and explicitly endorsed by the Division of Corporation Finance "was then adopted by the full Commission" (App. 39a). That the Commission was making a purely legal determination as to the interpretation of its Proxy Rules has never been denied by the Commission at any point in this litigation.[6]

D. THE RELIEF SOUGHT BY THE MEDICAL COMMITTEE IN THE COURT OF APPEALS BELOW

In order to understand what the Medical Committee asked of the Court of Appeals, it is necessary to understand the various alternative courses of action which are open to the Commission when (a) it decides to rule upon a shareholder-management dispute of this kind and (b) concludes that management has erroneously refused to accept the shareholder proposal for inclusion in the proxy materials. The petition for certiorari suggests that in such circumstances the Commission would have only two choices—either to take no action or "to institute an injunction action against the company in the District Court"; the petition repeatedly

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ance" (R. 44a), and the latter recommendation was explicitly based upon the legal conclusion asserted by Dow.

[6]The petition for certiorari asserts that "*the basic error* of the court of appeals" was its conclusion from the record that the Commission had endorsed Dow's position on the merits of the controversy (Pet. 11, emphasis added). As a preliminary comment we think that the charge that "the basic error" in the decision below was an error in *reading the record* militates, without more, against a grant of certiorari in this case. In addition, however, the petition's charge of "basic error" overlooks these facts: (1) The Division of Corporation Finance explicitly endorsed Dow's position on the merits and on that basis recommended no action against Dow; (2) the Commission explicitly adopted the recommendation of the Division; and (3) the Medical Committee has repeatedly challenged the Commission to deny that it endorsed Dow's position on the merits, and the Commission has refused so to deny.

maintains that there are no affirmative sanctions which the Commission itself could bring to bear against a company in such a situation without resort to the courts. (Pet. pp. 7, 10, 16). In fact, however, if the Commission concludes that a company has wrongfully refused to include a shareholder proposal in its proxy materials, there are at least four alternative courses open to the Commission: (1) the Commission can file a suit for injunctive relief against the company; or (2) the Commission can commence a new administrative proceeding looking toward suspension of the registration of the company's securities because of its violation of the Proxy Rules;[7] or (3) the Commission can commence a new administrative proceeding against the company looking toward an administrative declaratory order that the company has violated the Proxy Rules;[8] or (4) the Commission can decide, despite the company's violation of the Proxy Rules, that the Commission should nevertheless take no action against the company for some reason falling within the realm of prosecutorial discretion (*i.e.*, lack of funds or personnel, dissatisfaction with the particular facts as a basis for litigation, etc.).

In the instant case, when the Commission apparently adopted the legal interpretation advanced by Dow, the Medical Committee regarded that conclusion as being not only incorrect but also potentially damaging to the Medical Committee and to corporate shareholders generally for years to come. Accordingly, the Medical Committee filed a petition for review of the Commission's action in the United States Court of Appeals for the District of Columbia Circuit, relying upon Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a), which provides in effect that "any person aggrieved" by a Commission order "in a proceeding under this Chapter to which such person is a party" may obtain appellate review. But in its petition and subsequent briefs the Medical Committee made clear that it

[7] 15 U.S.C. § 78s(a)(2).

[8] 5 U.S.C. § 554(a), (e) (Supp. V, 1970).

was *not* asking the Court of Appeals, if it should agree with the Medical Committee's position on the merits, to direct the Commission to take any one or another of the various alternatives open to the Commission in such circumstances; the Medical Committee has consistently recognized, as has the Court of Appeals, that the particular choice among these alternatives was a matter to be left to the discretion of the Commission. Accordingly, the Medical Committee simply asked the Court of Appeals (a) to review the Commission's apparent interpretation of the Proxy Rules and (b), if the Court concluded that that legal interpretation was wrong, to remand the case to the Commission to allow it to exercise its discretion (as among the four available choices) consistent with a *proper* interpretation of the Proxy Rules.

E. THE PROCEEDINGS IN THE COURT BELOW

The petition for certiorari has failed to describe fully the first step taken in the court below. Immediately after the Medical Committee had filed its petition for review, the SEC moved to dismiss the petition, arguing that the action taken by the Commission below was not reviewable under Section 25(a) of the Exchange Act. After the motion had been fully briefed and argued before Tamm, Leventhal, and McGowan, JJ., Judge Tamm voted to dismiss the petition for want of jurisdiction (a point on which he later changed his mind), but Judges Leventhal and McGowan voted to deny the Commission's motion to dismiss "without prejudice to renewal thereof in the briefs and at the argument on the merits." It was so ordered on October 13, 1969.[9]

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[9] The per curiam order reads as follows:

> "This cause came on for consideration on respondent's motion to dismiss the petition for review herein, and the Court heard argument of counsel. On consideration thereof, it is
>
> "ORDERED by the Court that respondent's aforesaid motion to dismiss is denied without prejudice to renewal thereof in the briefs and at the argument on the merits."

Thereafter the Medical Committee, the appellant below, filed a 50-page brief directed entirely to the merits—*i.e.*, to the question whether Dow and the Commission were correct in their reading of the Proxy Rules as applied to the Medical Committee's proposal. Although the Court of Appeals clearly contemplated that both parties would present "full argument on the merits" (see App. 32a), the Commission refused to do so; it filed a brief which was again directed solely to the question whether the Court of Appeals had jurisdiction to review the Commission's action.[10] At no time in this litigation—either in the instant petition for certiorari or at any prior stage—has the Government ever undertaken to defend the legal interpretation which Dow and the Commission placed upon the SEC's Proxy Rules in the present controversy.

The panel which considered the case in full below consisted of Tamm, McGowan, and Robinson, JJ. They unanimously held (1) that the legal determination apparently made by the Commission below was subject to judicial review under Section 25(a) of the Exchange Act and (2) that, on the merits, at least on the present record "the position taken by [Dow] and endorsed by the Commission" with respect to Dow's legal obligation to include the Medical Committee's proposal in its proxy materials appeared to be erroneous as a matter of law. (See App. 33a, *et seq.*) Since the petition for certiorari does not now seek review of the court's unanimous view of the merits, for the purposes of the present proceeding it must be *assumed* that Dow, with the endorsement of the Commission, *wrongfully* excluded the Medical Committee's proposal from the company's proxy materials.

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[10] See the following statement in the opinion below:

> "Despite the fact that our October 13 order in this case deferred resolution of the jurisdictional issue pending *full argument on the merits* . . ., the Commission has not deigned to address itself to any possible grounds for allowing management to exclude this proposal from its proxy statement." (App. 32a, emphasis added).

REASONS FOR DENIAL OF THE WRIT

I. SINCE THE PRINCIPLE OF REVIEWABILITY APPLIED BELOW WOULD PROVIDE JUDICIAL REVIEW OF SEC ACTION ONLY IN VERY RARE CIRCUMSTANCES, THE PETITION FOR CERTIORARI HAS SUBSTANTIALLY OVERSTATED THE PRACTICAL IMPLICATIONS OF THE RULING BELOW.

The instant petition for certiorari has resorted to the familiar device of "a parade of horrors." The basic argument is (a) that, *whenever* the SEC looks at proxy materials, for whatever purpose, it invariably proceeds "informally" and (b) that to allow judicial review of all agency decisions as to proxy materials would "necessarily" require the agency to formalize all of its informal proxy reviews—some 5,300 per year—which would unduly hamper the agency's operations and promote "unnecessary appellate litigation" on a grand scale (see Pet. pp. 14-17).

As pointed out in our Counterstatement of the case, this line of argument is highly misleading. This case has nothing to do with the 5,300 proxy reviews which the agency makes on a routine informal basis every year (see pp. 2-4, *supra*); it relates only to a handful of situations (probably less than ten per year) in which a company flatly refuses to accept a shareholder proposal for inclusion in the company's proxy materials, thus giving rise to "an adversary encounter" which, under the agency's mandatory rules, must be brought before the agency in accordance with the latter's specially designed "*formal* procedures" for handling such disputes.[11]

Moreover, it should not be thought that the decision below calls for judicial review every time the agency takes action in one of these "adversary encounters." The statu-

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[11] The court below made very clear that its ruling applies only where "an adversary encounter" between a shareholder and management has been brought before the agency pursuant to the "mandatory" and "formal procedures" followed in this case (App. 16a-23a) —which renders the ruling below wholly inapplicable to the agency's routine "informal" review of proxy statements.

tory review provision invoked in this case—Section 25a of the Exchange Act—allows judicial review only where action has been taken by the five-man *Commission*; both the Medical Committee and the Court of Appeals below have affirmatively disavowed any thought that judicial review is available where a shareholder-management dispute is handled at the staff level and the Commission itself has not stepped in. Furthermore, as the Court of Appeals emphasized, the Commission has complete and unfettered discretion as to whether to undertake a decision in the matter itself or whether to leave the issue to the staff (see App. 29a), which means that the Commission, if it wishes, can completely eliminate judicial review of agency action in disputes of this kind, simply by not taking action itself in the particular dispute. In any event, given the facts that only about ten such disputes reach the agency in a given year and that a minority of those are selected by the Commission for its own personal review, it would appear that the Commission itself probably acts in only three or four such cases per year.

Finally, although the ruling below would theoretically subject each of those three or four Commission decisions in a given year to judicial review, it is clearly predictable that judicial review would not be sought in each such case. For example, if the administrative record in a given case indicated that the Commission, having chosen to rule but not to prosecute, had rested the latter decision solely on matters falling within its prosecutorial discretion (e.g., a lack of sufficient funds or personnel), without having reached any legal conclusion which would be harmful to the shareholder, the shareholder would have no incentive to seek review of the Commission's decision.[12]

[12]Theoretically, an exercise of prosecutorial discretion by the Commission might be subject to extremely narrow judicial review to determine whether the administrative discretion had been abused, but it is highly unlikely that, in the absence of a legal determination by the Commission, any shareholder would expend the necessary time and money to obtain review and demonstrate a discretionary abuse, simply because such review would not provide any legal interpretation of the Proxy Rules.

The shareholder would have such an incentive only if it appeared that the Commission's action was based upon an erroneous legal interpretation which would plague the particular shareholder in any later private suit which he might bring[13] and which would also deprive other shareholders of affirmative help from the Commission in similar shareholder-management disputes in the future. Presumably this set of circumstances would arise in less than all of the three or four annual disputes in which the Commission itself (judging from past experience) might become involved.

The upshot is that the decision below, in a given year, might give rise to one or two direct appellate review proceedings which might not otherwise have occurred—but such a proceeding can and will occur only where the Commission itself has decided to inject itself into the dispute involved and has given some indication that its decision in the particular case is worth appealing. In view of the rarity of such situations, the decision below obviously would *not* lead, as the petition suggests, to the "formalization" of a vast number of decision-making steps on the part of the agency,[14]

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[13]The petition for certiorari argues at length that the Commission's interpretation of the Proxy Rules in a particular dispute would be "legally irrelevant", and could not properly be given weight, in any private suit later brought by the shareholder against the company (Pet. 12, n. 10). As the petition itself recognizes, however, the argument is inconsistent with a line of decided cases. See also p. 14, n. 15, *infra*.

[14]The petition argues that the decision below will require "more formal procedures" to be followed by the agency in reviewing the "5,300 proxy statements" which it handles every year (see Pet. 15-16). As indicated above, in fact the decision below will have no impact on the "informal procedures" used in reviewing proxy statements on a routine basis. Moreover, the SEC has already "formalized" its procedures for handling shareholder-management disputes with respect to shareholder proposals. The only effect that the decision below can have in terms of "formalizing" the conduct of the five-man Commission would be to require the Commission, when interpreting its own Proxy Rules in connection with such a dispute, to enunciate its interpretation with sufficient clarity to allow a reviewing court to determine whether the interpretation was correct as a matter of law.

and it has no possibility of creating an avalanche of "unnecessary appellate litigation."

In this last connection it should not be thought that *any* "unnecessary" appellate litigation will result from the ruling below. The petition's assertion to the contrary rests upon the assumptions (a) that, when the Commission has refused to act in support of a shareholder in such a dispute, the shareholder can readily obtain "whatever relief is necessary" through a private suit in a Federal District Court (Pet. 17) and (b) that the Commission's earlier negative reaction to the shareholder's contentions would not be held against him in such a proceeding (Pet. 12, n. 10), thus rendering the private suit an effective remedy and direct appellate review of the Commission's action "unnecessary" (Pet. 16). As explained in the margin, however, both propositions are quite clearly incorrect.[15] Not only is the existence of the

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[15]Taking the cited propositions in reverse order,

(1) The District Courts traditionally give weight to the Commission's prior reaction to the issue, which cannot help but impair the shareholder's chances of success at the District Court level. The petition itself cites four examples (although suggesting that the four cited cases "were incorrectly decided", Pet. 12, n. 10), and numerous other examples exist: See, *e.g.*, Peck v. Greyhound Corp., 97 F.Supp. 679, 681 (S.D.N.Y. 1951); Kauder v. United Board and Carton Corp., 199 F.Supp. 420, 423-4 (S.D.N.Y. 1961); and Sherman v. Posner, 266 F. Supp. 871, 874 (S.D.N.Y. 1966). See also Aranow and Einhorn, *Proxy Contests for Corporate Control*, 296 (2d ed. 1968).

(2) The relief which is really "necessary" in such a case is an injunction prohibiting the company from distributing its proxy materials without including the shareholder proposal, but the time schedule established by the Commission (see 17 C.F.R. §§ 240.14a-8(d), 240.14a-6(a) may afford the shareholder only a few days in which to prosecute his case before the mailing date of the proxy materials, which forecloses the possibility of final injunctive relief, and in seeking preliminary injunctive relief the shareholder faces the double burden of attempting to show a likelihood of success on the merits in the face of a Commission rejection of his arguments.

[Continued]

very dubious District Court remedy irrelevant to the present issue of reviewability,[16] but, as emphasized in the opinion below, such District Court litigation in a case of this kind would constitute an expensive and "circuitous" method of obtaining an authoritative appellate resolution of the legal question at issue (App. 23a-25a).[17] The fact that a shareholder could embark upon such a circuitous exercise certainly does not render "unnecessary" the type of judicial review—however rarely it will occur—that was undertaken below.

Indeed, the petition for certiorari itself acknowledges, perhaps inadvertently, the utility of such occasional direct review; it recognizes the possibility that such review may serve to "expose alleged legal errors of the Commission in interpreting and applying the proxy rules" (Pet. 17). We agree. And we also submit that, since erroneous interpretations of the Rules by the agency charged with their enforcement can have a drastic impact upon the rights of

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See also the following comment in the New York University Law Review (which commends the Court of Appeals' decision below):

> "While the intent of the SEC in these proxy matters is to place the burden of proof on the corporation's management [citing 19 Fed. Reg. 246 (1954)], it would hardly seem consistent that, in a private action to uphold the same rights the SEC is designed to protect, the burden should shift to the shareholder." 45 N.Y.U. L.Rev. 1098, 1102 (Nov. 1970).

[16]It is clear as a matter of law that the existence of a District Court remedy does *not* bar direct appellate review where such review is provided by statute. For example, Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides in effect that where, as here, agency action is "made reviewable by statute", the right to direct appellate review is not destroyed by the existence of some other "adequate remedy".

[17]The opinion below emphasizes that in the present case the facts are undisputed, that there is therefore no need to bring to bear any peculiar "competence of the district court", and that in such circumstances litigation at the District Court level is no more than a wasteful inconvenience. *Id.*

shareholders generally, such "exposure" through occasional and limited judicial review is vital to the preservation of corporate democracy in this country.

II. SINCE THE ISSUE OF REVIEWABILITY PRESENTED HERE IS ONE WHICH CAN BE AND WAS CORRECTLY RESOLVED BELOW THROUGH THE APPLICATION OF ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW (ALTHOUGH APPLIED TO AN AGENCY NOT PREVIOUSLY INVOLVED IN LITIGATION RAISING THIS ISSUE), THE CASE AT BAR INVOLVES NO NOVEL LEGAL ISSUES DESERVING REVIEW BY THIS COURT.

Although the Court of Appeals below obviously recognized that the principles of reviewability which it was invoking had never before been applied to a decision of this particular agency (the SEC) (presumably because no shareholder had previously been willing to assume the financial burden involved in seeking such review), the court also pointed out that its decision to undertake limited and partial review of a legal determination made by such an administrative agency was "scarcely a doctrinal innovation" and that review of this general kind had "been repeatedly sustained by the Supreme Court," citing, *inter alia, McGrath v. Kristensen,* 340 U.S. 162, 169 (1950), and *Perkins v. Elg,* 307 U.S. 325, 349-50 (1939) (App. 30a). In *Perkins v. Elg,* for example, the plaintiff sought judicial review of the Secretary of State's denial of a passport—a matter which, by tradition, was committed entirely to the discretion of the Secretary. The Government vigorously argued there, as it does here, that judicial review was not appropriate with respect to such a discretionary function, but the Court pointed out that the Secretary's decision in the particular case had been based entirely upon an interpretation of the law as to the plaintiff's legal eligibility for a passport. Presumably, if the Secretary had denied the passport on some discretionary ground, *de novo* judicial review would have

been inappropriate, but the Court squarely held that the Secretary's purely *legal* determination would and should be so reviewed. 307 U.S. at 349-50. As Mr. Justice Jackson later observed in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185, n. 5 (1951),

> "The Secretary might say that [the applicant] would get no passport, but he could not, for unjustifiable reasons, say she was ineligible for one."

We think it apparent that the four judges[18] who considered the matter below were quite correct in their unanimous conclusion that these conventional and established principles of law were controlling on the issue of reviewability presented here.[19]

The petition for certiorari, however, repeatedly suggests (Pet. 6, 7, 8) that over the past 30 years it has been recognized, both by the courts and by commentators, that, if the Commission undertakes to consider a shareholder-management dispute as to the content of the company's proxy

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[18]As noted above, Judges Leventhal and McGowan voted to deny the Commission's motion to dismiss the Medical Committee's petition for review, with Judge Tamm dissenting, but Judge Tamm subsequently changed his mind and wrote the opinion below, with Judges McGowan and Robinson concurring, holding that judicial review was appropriate in this case.

[19]We simply do not understand the petition's attempt to "distinguish" the cited cases on the ground that the reviewable "legal rulings" involved in those cases were "preliminary to", rather than "an integral part" of, the discretionary function. (See Pet. 14). The attempted distinction would seem to turn merely on the order in which the agency considered the various elements which entered into its decision. Obviously the matter is not one of temporal order; the question is whether the legal issues decided by the agency are as a practical matter intelligibly separable from the discretionary factors so as to be capable of separate review. See Schilling v. Rogers, 363 U.S. 666, 675 (1960); Saferstein, "Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion,'" 82 Harv. L. Rev. 367, 381 (1968).

materials, and if the Commission then decides to act or not to act *on the basis of an erroneous interpretation of the law,* that erroneous legal decision by the Commission is immune from judicial review. The fact is otherwise. Neither of the two cases cited in the petition dealt with that issue.[20] As for the commentators cited in the petition (p. 6), neither Professor Loss nor Professor Davis asserts that a legal decision of the Commission made in a dispute involving a shareholder proposal is unreviewable. Indeed, Professor Davis, writing in his 1965 Supplement, has expressly recognized that *McGrath v. Kristensen, supra,* continues to be "good law, because it is in accord with other cases and because it allows the court to decide issues of law." 3 Davis, § 27.01, p. 148 (1965 Supp.).[21] Thus

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[20] In Peck v. Securities and Exchange Commission, C.A. 2, No. 22289, April 7, 1952 (discussed in the petition at page 6), the Commission itself filed a brief emphasizing to the Court of Appeals for the Second Circuit that the petitioner there was *not* "seeking review of the merits of the Commission's interpretation [of its Proxy Rules]" (Brief of Respondent in Support of Motion to Dismiss Petition for Review, p. 18, March 31, 1952). This necessarily means that *Peck* did not involve the issue presented here—a conclusion with which Professor Loss agrees. III Loss, Securities Regulation, 1926, n. 28 (1961).

In Leighton v. Securities and Exchange Commission, C.A. 2, No. 26458, November 3, 1960, *cert. denied,* 365 U.S. 888 (1961)—which did *not* involve a shareholder proposal for inclusion in the corporate proxy materials—the petitioner sought judicial review of a *staff* letter which said, "we will give the matter our careful consideration and will take any action which seems appropriate under the circumstances." Obviously judicial review of the staff letter was denied, but that says nothing about judicial review of a *Commission* decision of law in a shareholder-management dispute.

[21] The petition also relies (p. 6) upon Aranow and Einhorn, Proxy Contests for Corporate Control, 297 (2d ed. 1968), and Clusserath, The Amended Stockholder Proposal Rule; A Decade Later, 40 Notre Dame Lawyer, 13, 17 (1964). Although these two sources refer to a decision of the kind here at issue, they hardly evidence a "generally recognized" view—particularly since these are sources which concentrate upon the internal practices of the SEC rather than the problems and principles of judicial review.

the petition's citations do *not* establish that the unanimous decision below represents a departure from established general principles of administrative law, and the judges who made it did not so regard it.

In attempting to defend the proposition that the legal principles invoked below are wholly unconventional, the petition for certiorari attempts to belittle the utility of judicial review in such circumstances. As noted above, the petition insists that in such a case "the Court of Appeals can do *no more* than expose alleged legal errors of the Commission in interpreting and applying the proxy rules" —as though such "exposure" were hardly a worthy objective—and that such a judicial decision "determines nothing at all with finality and is but the harbinger of further proceedings to come" (Pet. 17, emphasis added). But precisely the same can be said of this Court's decisions in *Perkins v. Elg* and *McGrath v. Kristensen, supra.* The purpose of judicial review in such circumstances is precisely to "expose" any "legal errors" made by a responsible administrative agency in performing its discretionary functions and to remand the controversy to the agency to allow it to exercise its discretion in a manner consistent with the *correct* principles of law enunciated by the Court. So here, the review undertaken by the court below has already succeeded in exposing an apparent legal error which has been affecting the conduct of the Commission, with a resulting (and wrongful) contraction of the Commission's view of its own responsibilities, and the utility of the exposure is already apparent.[22] As the cited decisions of this Court

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[22]On November 6, 1970, the Chairman of the Commission delivered a speech before the National Investor Relations Institute in Washington, D.C., and stated publicly that the Court of Appeals' views on the merits in this case have already resulted in a fresh administrative review of the substantive content of the Proxy Rules. Referring to the decision of the Court of Appeals below, the Chairman stated in part as follows:

> "For this and other reasons, our staff is reconsidering our substantive rules relating to shareholder proposals to determine if appropriate amendments are needed."

demonstrate, it has long been recognized that occasional corrective judicial review serves to insure that an administrative agency will carry out its discretionary responsibilities on the basis of a correct understanding of the law, and experience confirms (judging from the aftermaths of *Perkins v. Elg* and *McGrath v. Kristensen, supra*) that such corrective judicial action does *not* lead to a flood of "unnecessary" appellate proceedings.

CONCLUSION

Since the carefully confined principle of judicial review enunciated below can have practical application only in those rare situations where the Securities and Exchange Commission has voluntarily undertaken to make a legal determination in a shareholder-management dispute over a shareholder proposal for inclusion in the proxy materials, and since the decision below was correctly based upon conventional principles of administrative law long ago established by this Court, that decision does not merit review by this Court, and the petition for certiorari should be denied.

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No. 70-61

In the Supreme Court of the United States

OCTOBER TERM, 1971

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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I. JUSTICIABILITY AND MOOTNESS

1. The review sought by the Medical Committee and undertaken by the court below arises out of a controversy between the Medical Committee and Dow. That controversy, simply stated, was whether Dow should include the Medical Committee's proposal in a proxy statement for Dow's annual meeting.

The Commission has no machinery to adjudicate proxy disputes between private persons nor could it, as a practical matter, adjudicate such disputes and meet the rigorous time schedules encountered during the proxy season. Its interest in disputes between

shareholder proponents and management normally involves only (1) the adequacy and accuracy of the disclosures in the proxy materials, and (2) whether there appears to be a violation of the proxy rules sufficiently serious to require enforcement action by the Commission. To enable it to consider these matters, the Commission by rule has required corporate management to inform the agency as well as shareholder proponents whenever management decides to exclude a proposal from its proxy soliciting materials.[1]

The only "action" taken by the Commission in this case was to determine whether or not it would start a judicial proceeding to compel Dow to include the Medical Committee's proposal in Dow's proxy soliciting material for Dow's May 1969 annual meeting. Once the Commission had determined not to institute such an enforcement action, upon whatever grounds its members individually chose to rely, the Commission's direct interest in the matter ended and it had no view on the merits to express in the court of appeals.

The Medical Committee now urges that its petition

[1] Contrary to the Medical Committee's assertion (Br. 6, 26), the Commission has not characterized its staff consideration of shareholder proposals as "formal procedures." The Commission rule upon which the Committee apparently relies (17 CFR 202.1(b) and (c), which is miscited) is part of a section captioned "Informal and Other Procedures." It merely states that "formal procedures to be followed in Commission proceedings" are contained in "the published rules, regulations and forms" of the various statutes. 17 CFR 202.3 also is in this general section of the Commission's rules. Paragraph (a) of that provision (17 CFR 202.3(a)) specifically deals, *inter alia*, with the processing of proxy statements and refers to that as an "informal procedure."

for review sought to review only the "legal determination" (Br. 21) that it presumes the Commission made when it declined to institute any enforcement action, and that it does not seek to compel the Commission to take any action or grant it any relief.[2] But, as we discuss below (pp. 11–12), the Commission was not required to make such a conclusion, and normally would not have done so. In any event, the staff's views on the merits (Br. 17–18) provide no basis for assuming that the Commission had similar views.[3]

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[2] This represents a marked shift in the Medical Committee's position. Initially, it had requested that the Commission "take the necessary steps to compel Dow to include the proposal in its forthcoming proxy soliciting material" (App. 25).

[3] In *Sterling Drug, Inc.* v. *Federal Trade Commission*, C.A.D.C., No. 24,878, decided September 22, 1971, the court rejected the contention that memoranda containing the views of members of the Federal Trade Commission's staff were producible because they would indicate the views of the agency where the latter "did not issue an opinion giving the reasons for * * * [its] decision" (slip op. p. 11). Plaintiff had sought staff memoranda under the Freedom of Information Act, claiming that the agency's "reasons must of necessity be contained in the documents it seeks and that these documents must be disclosed 'in order to provide access to the basis for the agency decision and its rationale'" (*ibid.*). The court rejected this view, stating (per Judge Tamm, who wrote the decision below), *id.* at p. 13, that

> * * * our experience with the decision-making process leads us to believe that the material in these memoranda was probably filtered and refined by the Commission, with the result that its ultimate decision was something more than, or at least different from the sum of its "parts." Consequently, we doubt that an examination of the "parts" would give a very accurate picture of the decision.

[Footnote continued on next page.]

Accordingly, what the Medical Committee now seeks is a declaration unrelated to relief and to the only justiciable "controversy" that has ever existed in this matter, namely, that between the Medical Committee and Dow. Yet the Medical Committee has chosen an indirect course of review which avoids a direct confrontation with its only true adversary and is calculated to deny that adversary the protections afforded by district court procedures contemplated by the applicable statute. Section 27 of the Act gives the United States District Courts "exclusive jurisdiction of violations" of the Act and rules thereunder, and over "all suits in equity and actions at law brought to enforce any liability or duty created * * *" by the Act or rules thereunder.[4]

This case may well be a fine example of the reason why the jurisdiction of the federal courts was limited by the founders to "cases" and "controversies." For here we have important and difficult questions of cor-

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See, also, *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358–1359 (C.A. 2), where the court pointed out:

> * * * the views of individual members of the Commission's staff are not legally germane, either individually or collectively to the actual making of final orders. They could be grossly misleading * * * because at best they are only advisory in character. * * * [T]he staff memoranda sought can in no way be construed, as being a part of the Commission's final orders.

[4] The Medical Committee apparently was aware (Br. 44, 46) that, if successful, the appellate review it invoked would be likely to induce Dow to print its resolution without affording Dow an opportunity directly to defend its position. But that result does not alter the nonadversary nature of the Medical Committee's litigation with the Commission.

porate responsibility, of general application, coming up in a highly emotional context, which, though actually irrelevant to the issue of reviewability, may color the consideration of that issue despite the best efforts to the contrary. The questions which have been briefed by the parties here, at some length, are unrelated to any relief that this Court or the court below can grant. As this Court has stated, the jurisdiction of the federal courts

> is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case.

Liberty Warehouse Co. v. *Grannis*, 273 U.S. 70, 74.[5] In a context where the core of the problem is administrative discretion on enforcement matters and the only legal judgment involved is whether to bring an enforcement suit, the agency could still decline to take enforcement action even in the face of a court of appeals determination that there had been a violation of the proxy rules.

2. The facts of this case demonstrate not only that there never was any case or controversy between the Medical Committee and the Commission but also that the controversy between the Medical Committee and

[5] See, also, *United States* v. *Los Angeles R.R.*, 273 U.S. 299; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89–91.

Dow no longer exists. This appears from the following:

(1) The Medical Committee's proposal initially was submitted for Dow's May 1969 annual meeting. That meeting was held two and a half years ago, prior to the filing of the petition for review.

(2) Subsequent to the filing of the petition, Dow ceased to manufacture napalm for the government.

(3) Finally, Dow included the Medical Committee's resolution in Dow's proxy statement for its annual meeting held in May 1971.[6]

Thus, the Medical Committee has obtained everything it sought in this litigation, *i.e.*, the distribution of its proposal by Dow to enable the security holders to vote on it. All that it seeks now is a declaration that it was entitled to get what it has already received. Giving such declarations after the event is not the proper function of federal courts in our constitutional system.

Even if there is a difference of opinion as to the exact state of the law on proxy solicitation in cases of this sort, it is difficult to see how that dispute could properly be regarded as presenting a "case" or "controversy" under the applicable constitutional provision delimiting the Judicial Power. There is no relief

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[6] The Medical Committee's proposal received less than three percent of the vote of all shareholders (Br. 14) and, pursuant to Rule 14a–8(c)(4)(i), 17 CFR 240.14a–8(c)(4)(i), Dow may exclude the same or substantially the same proposal from its proxy materials for the next three calendar years. The questions whether the Medical Committee will make similar proposals after that time, and how Dow will treat them, are entirely speculative.

now sought by the Medical Committee. This case thus presents an abstract, academic dispute well-suited for extensive discussion in the law reviews; see 84 Harv. L. Rev. 700–728, 835–868. The possibility of its involving a live issue is more attenuated than ever today. Difficult and largely unprecedented problems of corporate responsibility and administrative review ought not to be answered in so abstract a setting, but ought to be decided only in the context of a specific live controversy, where the Court will have the benefit of the views of both parties to the substantive issue.

3. The slender nature of the case now before the Court is further shown by reference to an additional weakness which it carries.

Section 25(a) of the Securities Exchange Act of 1934 provides that a petition for review must be filed "within sixty days after the entry" of the Commission's order. Here the order (if there was an order) was entered on March 24, 1969 (App. 44). The petition for review was filed on May 29, 1969 (App. 3, 4), which is sixty-six days after the entry of the order.

The court below held (see App. 51–53) that the petition for review was timely filed since the Medical Committee did not receive written notice of the order until April 2, 1969 (App. 42–43), although notice by telephone was given earlier, on March 24, 1969 (App. 46). The decision that the time runs from the date of written notice rather than from the date of "entry" of the order, as specified in the statute, is at least novel, and is not applied with respect to judgments

of this Court, or with respect to the judgments reviewed by this Court.

It is of course true that this question was not raised in the petition for certiorari. It is not the sort of question which is appropriate for certiorari. But it may be jurisdictional, and as such is one which the Court normally would consider on its own motion. This may well be a further reason for not giving here an advisory opinion in a case where the relief sought has already been fully given, and over which the court below may well have had no jurisdiction.

II. Congress Did Not Intend the Courts To Administer the Proxy Rules

The ramification of questions in this case can be rather extensive and complicated, as the briefs already filed show. But the basic question may be relatively simple. It is one of separation of powers, or perhaps more accurately, of allocation of powers. In brief, we submit that the administration of the proxy regulations is a matter which Congress has committed to the administrative process without provision for or expectation of judicial review. Cf. the illuminating statement by Judge Friendly in *Langevin* v. *Chenango Court, Inc.*, 447 F. 2d 296 at 303 (C. A. 2).

There is room in our governmental structure for the administrative process. There is ample basis for the conclusion that oversight of proxies is a matter—perhaps because of its inherent complexity and uncertainty—which Congress chose to allocate for administrative handling. It remains, of course, subject to the continued review of Congress through changes in

the applicable statute, a review which Congress has never found it necessary to exercise.

It is not an essential of constitutional government that all questions must eventually be decided by courts. As then Justice Stone said: "Courts are not the only agency of government that must be assumed to have capacity to govern." *United States* v. *Butler,* 297 U.S. 1, 87 (dissenting opinion). Congress could well conclude that the handling of problems relating to proxies, with all the infinite variations of subject matter and circumstance, could best be left to administrative judgment, at least until certain issues became clearly enough identified to become appropriate for further legislative provision.

That, indeed, is what Congress did in this statute—Section 14(a) of the Securities Exchange Act of 1934. Congress laid down *no rules* with respect to proxies. Instead, it allocated the area to the Commission. Congress made it illegal to use the mails or the facilities of interstate commerce, or of an exchange, to solicit a proxy contrary to—

> such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors * * *.

The rules are the Commission's—by a complete delegation and clearly-intended allocation of Congress. In an area so amorphous, it seems reasonably clear that Congress allocated to the Commission not only the making of the rules and regulations but also the function of determining their administration and their enforcement in concrete cases. Compare *Gray* v.

Powell, 314 U.S. 402; *Dobson* v. *Commissioner,* 320 U.S. 489.

This is especially true in the present situation. Questions with respect to proxies must inherently be handled very promptly. They are numerous, and they must inevitably be considered within the Commission quite informally. If all determinations under the proxy rules are subject to review by the courts, then they must be handled differently. There must be a thorough record; there must be reasoned opinions; there must be clearer opportunity for intra-Commission review—for all of which there is no time.[7] Congress may well have thought it better for the whole matter to be handled by the administrative process, without judicial review, subject only to its own legislative review if the system did not work well, and limiting utilization of judicial action to the enforcement process. And Congress has not found it necessary to change the statute (other than to expand its application to additional companies) in more than thirty-five years.

Support for the conclusion that this is what Congress intended rests not only in its allocation of the

[7] Judge Tamm, in a subsequent case, stated in response to a suggestion that agencies should issue an opinion with every order:

> This reasoning is unrealistic when applied to the everyday world of overburdened administrative agencies. Agencies are required to issue opinions with many of their orders [footnote citing Section 5(e) of the Administrative Procedure Act], but it is completely unreasonable to suppose that every agency order can be accompanied by an opinion.

Sterling Drug, Inc. v. *Federal Trade Commission,* C.A.D.C., No. 24878, September 22, 1971, slip op. pp. 14–15, footnotes omitted.

area to the Commission by Section 14(a). It is also found in the fact that Congress made no provision for any "order" by the Commission, so as to bring the area within the court review provision of Section 25(a). Perhaps of even more importance is the provision of Section 21(e) of the Securities Exchange Act, which provides that "[w]henever it shall appear *to the Commission*" that a person is about to violate a statute or regulation—

> it may *in its discretion* bring an action in the proper district court of the United States * * *. [Italics supplied.]

Thus the matter of enforcement is specifically allocated "to the Commission" and its action is directed to be taken "in its discretion". There is no provision that this essentially administrative determination shall be made by the courts, or even that the courts shall have power to review Commission action or inaction, unless "it shall appear to the Commission" that there is about to be a violation, and the Commission "in its discretion" brings an action in the proper court. The Commission has no authority by administrative order to direct compliance. And nothing in the statute requires the Commission to seek enforcement of any provision of the statute with respect to proxies. There could hardly be a clearer allocation of the matter to administrative competence. Congress having deliberately made that choice, there is no reason why its allocation of function should not be respected.

There are many reasons why the Commission might conclude that it would take "no action" in a particular

matter.[8] Not every case taken to a court will be decided by that court, as is evident in this Court's certiorari jurisdiction. Not every case can be taken to court, even though there may be basis for a court decision or review—as is evident in the function of the Solicitor General to decide what cases to appeal, and what cases to bring to this Court on petition for certiorari. These are discretionary functions, and it would be hard to give a consistently reasoned justification for every decision—and there would not be time to do it if for some reason it was thought that it had to be done.

The function of the Commission in this case was likewise discretionary. It was not required to take any action at all on the Medical Committee's request—even of "no action." Whether it sought enforcement of the rules was specifically allocated by Congress for determination by the Commission "in its discretion." To make this the subject of judicial review under Section 25(a) is to reallocate to the courts an area which Congress specifically chose to be handled by the administrative process—without seeking to preclude anyone from pursuing his rights in the proper forum, the district courts.

Even if, as the Medical Committee argues (Br. 25), the question whether the proxy rules required Dow to include the Committee's proposal presents "an isolatable determination of law," the question whether the Commission properly declined to take enforcement action cannot be broken down for purposes of judicial review into separate and unrelated elements of law and policy.

[8] See the Commission's main brief, p. 13.

The Commission's ultimate enforcement judgment necessarily reflected a fusion of all the relevant considerations it took into account. It would ignore the realities of the actual functioning of the administrative process to conclude that, although the agency's enforcement determination is not reviewable, certain of the legal theories that that determination may have involved are nevertheless subject to direct judicial scrutiny.

All of this is nicely exemplified by the present case. The court of appeals was not in a position to vindicate any right of the Medical Committee. That can be done only in a district court in an action to enforce compliance with the proxy rules. The court of appeals cannot order the Commission to seek enforcement; there is no provision for such a mandatory order in Section 25(a) and the decision to seek enforcement has been expressly committed by Congress to the discretion of the Commission. All that the court of appeals can do in this case is to express its view of the law applicable to a controversy between the Medical Committee and Dow that has not been presented by those parties for the court's consideration. And the decision of the court of appeals will not be binding on the district court if the Medical Committee seeks to enforce there its rights as a shareholder—if for no other reason than that Dow is not a party before the court of appeals and is not in any way bound by its decision.

Thus the present procedural posture of the case shows clearly enough that the only end to which it can come is an advisory opinion by the court below

on a matter as to which that court can require no action to be taken, and which is one that Congress has expressly allocated, for good reason, for handling by the administrative process, and not by the courts.[9]

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

G. BRADFORD COOK,
General Counsel,

DAVID FERBER,
Solicitor,
Securities and Exchange Commission.

NOVEMBER 1971.

[9] The Medical Committee relies upon *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, as sustaining reviewability. In that case, however, the government itself urged that the agency action that was challenged—a Commission ruling on the application of the fairness doctrine made in a letter to a licensee—was reviewable as a declaratory ruling which the agency's own rules authorized the Commission to issue. 395 U.S. at 372–373, n. 3. In the present case, on the other hand, the Commission consistently has taken the position that its action is not reviewable, and the statute does not authorize the issuance of any "orders" in proxy matters.

U.S. GOVERNMENT PRINTING OFFICE: 1971

Syllabus

SECURITIES AND EXCHANGE COMMISSION *v.* MEDICAL COMMITTEE FOR HUMAN RIGHTS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 70–61. Argued November 10, 1971—Decided January 10, 1972

The Court of Appeals, overruling the contentions of the Securities and Exchange Commission (SEC), held that it had jurisdiction to review the SEC's "extremely dubious" determination not to oppose the Dow Chemical Co.'s refusal of respondent shareholder's request to include its proposal for a corporate charter amendment in Dow's proxy statement. Thereafter Dow acquiesced in the request, and at its annual meeting less than 3% of the voting stockholders supported the respondent's proposal, as a result of which the company under an SEC rule may exclude the proposal from its proxy material for a three-year period. *Held:* Since it is extremely doubtful that at the end of that period respondent will resubmit the proposal and Dow will refuse it, the case is now moot. Pp. 405–407.

139 U. S. App. D. C. 226, 432 F. 2d 659, vacated and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 407. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Solicitor General Griswold argued the cause for petitioner. With him on the briefs were *Daniel M. Friedman, William Terry Bray, Philip A. Loomis, Jr., David Ferber,* and *Richard E. Nathan.*

Roberts B. Owen argued the cause for respondent. With him on the brief was *Michael Boudin.*

Roger S. Foster and *Charles R. Halpern* filed a brief for the Project on Corporate Responsibility as *amicus curiae* urging affirmance.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Medical Committee for Human Rights acquired by gift five shares of stock in Dow Chemical Co. In March 1968, the Committee's national chairman wrote a letter to the company expressing concern over its policy with respect to the production and sale of napalm. The letter also requested that there be included in the company's proxy statement for 1968 a proposal to amend Dow's Certificate of Incorporation to prohibit the sale of napalm unless the purchaser gives reasonable assurance that the napalm will not be used against human beings. Dow replied that the proposal was too late for inclusion in the 1968 proxy statement and for discussion at that year's annual meeting, but that it would be reconsidered the following year.

In an exchange of letters with Dow in 1969, the Committee indicated its belief that it had a right under Rule 14a–8 of the Securities and Exchange Commission, 17 CFR § 240.14a–8 (1970) (promulgated pursuant to § 14 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, as amended, 15 U. S. C. § 78n (a)), to have its proposal included in the company's proxy statement for consideration by all shareholders. On February 7, 1969, Dow responded that it intended to omit the proposal (somewhat modified) from the 1969 statement under the authority of subsections of the SEC Rule relied on by the Committee which permitted omission of shareholder proposals under two sets of circumstances:

> § 240.14a–8 (c)(2)—"If it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes"; or

> § 240.14a–8 (c)(5)—"If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."

The Committee requested that Dow's decision be reviewed by the staff of the SEC. On February 18, 1969, the Chief Counsel for the Division of Corporation Finance wrote both Dow and the Committee to inform them that "this Division will not recommend any action to the Commission if this proposal is omitted from the management's proxy material." App. 21. The SEC Commissioners granted a request by the Committee that they review the Division's decision and affirmed it. App. 43. The Committee then sought and obtained review of the Commission's decision in the United States Court of Appeals for the District of Columbia Circuit.

On July 8, 1970, the Court of Appeals held that the decision of the SEC was reviewable under § 25 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78y (a); that while review of Dow's decision was clearly available in district court, review of the SEC's decision could also be obtained in a court of appeals; that the validity of the Commission's determination was extremely dubious, especially in light of its failure to state reasons supporting its conclusion; and that the case should be remanded to the Commission for reconsideration and a statement of reasons. 139 U. S. App. D. C. 226, 432 F. 2d 659. The Commission petitioned for review here, and we granted certiorari on March 22, 1971. 401 U. S. 973.

Events have taken place, subsequent to the decision by the court below, and some subsequent to our decision to grant certiorari, that require that we dismiss this case on the ground that it has now become moot. In January 1971, the Medical Committee again submitted

its napalm resolution for inclusion in Dow's 1971 proxy statement. This time Dow acquiesced in the Committee's request and included the proposal. At the annual stockholder's meeting in May 1971, Dow's shareholders voted on the Committee's proposal. Less than 3% of all voting shareholders supported it, and pursuant to Rule 14a–8 (c)(4)(i), 17 CFR § 240.14a–8 (c)(4)(i), Dow may exclude the same or substantially the same proposal from its proxy materials for the next three years. We find that this series of events has mooted the controversy.

Respondent argues that it will continue to urge the adoption of the proposal and its inclusion in proxy statements, and that it is likely that Dow will reject inclusion in the future as it has in the past. It is true that in permitting the proposal to be included in the 1971 proxy statement Dow stated that it adhered to its opinion that the proposal might properly be omitted and that its inclusion was without prejudice to future exclusion. However, this does not create the controversy that is necessary for us to retain jurisdiction to decide the merits. Whether or not the Committee will actually resubmit its proposal or a similar one in 1974 is purely a matter of conjecture at this point, as is whether or not Dow will accept it. If Dow were likely to repeat its allegedly illegal conduct, the case would not be moot. See *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43 (1944); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953). However, in light of the meager support the proposal attracted, we can only speculate that Dow will continue to include the proposal when it again becomes eligible for inclusion, rather than to repeat this litigation. Thus, we find that "the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968). The case is therefore moot.

"[I]t is well settled that federal courts may act only in the context of a justiciable case or controversy." *Benton* v. *Maryland*, 395 U. S. 784, 788 (1969). "Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306 n. 3 (1964); cf. *Doremus* v. *Board of Education*, 342 U. S. 429, 434 (1952).

Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded to that court for dismissal.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

With all respect, I must dissent from the judgment of the Court that this case has become moot because the Dow Chemical Co. acquiesced in the decision of the Court of Appeals below. The underlying dispute in this case is essentially a private one, between Dow and the Medical Committee for Human Rights, though it has large public overtones. In 1969, Dow refused to submit to its shareholders the Medical Committee's proposal that Dow amend its corporate charter to forbid the manufacture of napalm. Dow refused again in 1970. Only in 1971, after the decision of the Court of Appeals now under review, did Dow permit such a proposal to be submitted for a vote. In doing so, however, Dow resolutely affirmed its right to reject the proposal at any future time.

This gratuitous conduct did not, in my view, moot the controversy. "Mere voluntary cessation of allegedly illegal conduct does not moot a case." *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203. If it could,

then a defendant would always be "free to return to his old ways." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632.[1]

But it is said that because of the poor showing made by the proposal when finally submitted, Dow could refuse to resubmit it for three years under SEC proxy rules not at issue in this case. *Ante*, at 406. The Court suggests that it is "purely a matter of conjecture" that the proposal will again be submitted at the expiration of this period, and that Dow will attempt again to reject it. The Court seems to think that Dow's best strategy, given the proposal's poor showing, is to let it go to a vote, rather than undertake protracted litigation. *Ibid.*

This assumption, however, is not only baseless, it is irrelevant. In *Grant, supra*, an antitrust violation was charged because of an interlocking directorate. In response to the suits, the interlocking directors resigned,

[1] See also *Walling* v. *Helmerich & Payne*, 323 U. S. 37, where we held a case involving the legality of "split-day contracts" under the Fair Labor Standards Act was not rendered moot by the defendant company's abandonment of the contracts during the litigation. "Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. . . . Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made." *Id.*, at 43.

The vitality of this controversy was recognized by the Solicitor General, himself, virtually to the moment of oral argument. While he has abruptly reversed his position, the force of his prior argument remains undiminished. Citing the above quotation from *Walling*, he said in his First Reply Brief:

"The same reasoning [as that of the *Walling* Court] applies to the dispute between respondent and Dow over whether the latter is required to distribute to its shareholders the Committee's proposal. Dow continues to insist that it is not required to distribute the proposal, and, even if it does so this year [1971] and the proposal is defeated, Dow may reject it in future years." First Reply Brief 5.

and defendant companies represented to the court their intention not to revive the interlock. We disposed of this argument in summary fashion. "Such a profession does not suffice to make a case moot." *Id.*, at 633. Here, Dow has not even made the minimal representation we rejected in *Grant*, nor is it likely to do so.

This is not a controversy that could not arise again for decades, *Golden* v. *Zwickler*, 394 U. S. 103, or a controversy whose decision could have no possible future effect on the parties, *Atherton Mills* v. *Johnston*, 259 U. S. 13. Dow has for the past four years fought tooth and nail its obligation to include this shareholder proposal. While "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Phosphate Export Assn., supra*, at 203, that is hardly the situation here.

While this litigation is not formally between Dow and the Medical Committee, but between the SEC and the Medical Committee, it does involve a whole panoply of substantive [2] and procedural [3] rights in connection with a corporation's obligation to include shareholder proposals in proxy materials. The modern super-corporations, of which Dow is one, wield immense, virtually unchecked, power. Some say [4] that they are "private governments," whose decisions affect the lives of us all.[5] The philosophy of our times, I think, requires that such

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[2] See generally Note, 84 Harv. L. Rev. 700 (1971).

[3] See generally Note, 84 Harv. L. Rev. 835 (1971).

[4] See, *e. g.*, Miller, Toward the "Techno-Corporate" State?—An Essay in American Constitutionalism, 14 Vill. L. Rev. 1 (1968); J. Galbraith, The New Industrial State (1967); A. Berle, Economic Power and the Free Society (1957).

[5] A. Berle has suggested, for example, that

"The recession of 1956 was in part due to the fact that the three principal automobile manufacturers, General Motors, Ford, and Chrysler, sold 8 million cars in the previous year. *The National*

enterprises be held to a higher standard than that of the "morals" of the marketplace" which exalts a single-minded, myopic determination to maximize profits as the traditional be-all and end-all of corporate concern. The "public interest in having the legality of the practices settled, militates against a mootness conclusion." *Grant, supra,* at 632.

There is no reason to assume Dow's antipathy to the inclusion of this shareholder proposal will be any less in 1974 than it is today. Perhaps Dow will adopt the advice given to it by the Court. But it is just as likely to decide its superior financial position makes continued litigation the preferable alternative, which may now be conducted under proxy rules more favorable to corporate management [6] than are the present rules.

City Bank Economic Review estimated the 'normal' market for cars at the time at 6 million. The following year the motorcar companies sold only 4 million cars, and, naturally, purchased far less from their suppliers of raw materials, glass, et cetera. The effect on employment was severe." The Three Faces of Power 31 n. 2 (1967).

[6] In this regard, it should be noted that the SEC has recently proposed amendments to its proxy rules which might strengthen Dow's hand. The new rules would permit a company *to refuse to submit for a shareholder vote* any proposal which, *inter alia,*

"(ii) consists of a recommendation, request or mandate that action be taken with respect to any matter, including a general economic, political, racial, religious, social or similar cause, that is not significantly related to the business of the issuer or is not within the control of the issuer." Proposed amendment to Rule 14a–8 (c)(2), Securities Exchange Act Release No. 9432, Dec. 22, 1971.

There is substantial sentiment, however, for a more liberal approach to shareholder proxy proposals than is evidenced by the current, much less the proposed, rules. Senator Muskie, for example, introduced a bill in the last Congress, entitled the "Corporate Participation Act," which would have, *inter alia,* barred exclusion of a shareholder proposal "on the ground that such proposal may involve economic, political, racial, religious, or similar issues, unless

This case now joins a growing list of monuments to the present Court's abdication of its constitutional responsibility to decide cases properly within its jurisdiction. See, *e. g.*, *Picard* v. *Connor*, *ante*, p. 270, at 278 (DOUGLAS, J., dissenting); *North Carolina* v. *Rice*, *ante*, p. 244, at 248 (DOUGLAS, J., dissenting); *McClanahan* v. *Morauer & Hartzell*, *ante*, p. 16, at 17 (DOUGLAS, J., dissenting). Once again, I dissent.

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the matter or action proposed is not within the control of the issuer." S. 4003, § 2, 91st Cong., 2d Sess. For the view that a corporation should be required to include any shareholder proposal which is a "proper subject" for shareholder action under applicable state law, see Chisum, Napalm, Proxy Proposals and the SEC, 12 Ariz. L. Rev. 463 (1970). See also Note, 84 Harv. L. Rev. 700 (1971).